SUPREME COURT, U.S.
FILED
98 1860 MAY 18 1999
OFFICE OF THE CLERK

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

MAURICE BIANCHI fdba
M. BIANCHI OF CALIFORNIA,
Petitioner,

v.

DAVID M. WALKER, Comptroller General of the United States of America, THE UNITED STATES GENERAL ACCOUNTING OFFICE and BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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197cp

QUESTION PRESENTED

Whether the District Court has subject matter jurisdiction pursuant to 28 U.S.C. §1361 to mandate a Government officer to process the payment of an Award granted Petitioner by the Armed Services Board of Contract Appeals.

PARTIES TO THE PROCEEDINGS

MAURICE BIANCHI fdba
M. BIANCHI OF CALIFORNIA,

Petitioner,

v.

DAVID M. WALKER, Comptroller
General of the United States
of America, THE UNITED STATES
GENERAL ACCOUNTING OFFICE and
BANK OF AMERICA NATIONAL
TRUST & SAVINGS ASSOCIATION,

Respondents.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 163 F.3d 564 (9th Cir. 1998). App. A, *infra*, 1a.[1] The Order and the Judgment of the District Court for the District of Nevada are unpublished and are included at App. B, *infra*, 18a and App. C, *infra*, 26a.

The prior Opinion of the United States Court of Appeals for the Ninth Circuit in the matter of *Bianchi vs. Perry* is reported at 140 F.3d 1294 (9th Cir. 1998). App. D, *infra*, 28a.

The prior Opinion of the United States Court of Appeals for the Federal Circuit in *Bank of America vs. United States* is reported at 23 F.3d 380 (Fed.Cir. 1994). App. E, *infra*, 43a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its Opinion on December 11, 1998. On January 13, 1999, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing, En Banc. App. F, *infra*, 66a. The United States Court of Appeals for the Ninth Circuit denied the Petition for Rehearing on February 17, 1999. App. G, *infra*, 91a. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) and §2106.

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[1] Citations to "App." are to the Appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

STATUTORY PROVISIONS INVOLVED

Section 2 of 41 U.S.C. §607 establishes the jurisdiction of Boards of Contract Appeals and provides, in relevant part, that a Board of Contract Appeals "is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims..."

41 U.S.C. §609(a)(1) provides a contractor with an election to bring an action directly on the claim in the United States Court of Federal Claims or to a Board of Contract Appeals.

28 U.S.C. §1361 confers the District Courts with original jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff.

STATEMENT OF THE CASE

The facts of this case are uncomplicated and undisputed. Petitioner, an individual doing business as a sole proprietor under the trade name and style of M. Bianchi of California, entered into a series of contracts with the Defense Personnel Support Center at Philadelphia (DPSC) for the manufacture of mens' and womens' military uniforms. A dispute arose between Bianchi and the DPSC in which the DPSC claimed a breach on the part of Bianchi and Bianchi claimed damages due to cost overruns. The contract disputes were heard at the Armed Services Board of Contract Appeals (ASBCA). In September 1988, the Government and Bianchi entered into a "Stipulation to Board Decision" (App. H, *infra*, 93a) setting forth the terms of the settlement of the underlying

contract disputes and reserving to Bianchi his claims for litigation fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. §504, et seq. and 28 U.S.C. §2412, and Value Engineering Change Proposals pursuant to Contract Clause J-09.

The Stipulation to Board Decision was intended to be, and was, incorporated into the Opinion of the ASBCA, styled, "Opinion by Administrative Judge Burg." App. I, *infra*, 96a. Pursuant to the terms of that Stipulation, the Government agreed to take nothing by way of its breach claims and further agreed to pay Bianchi the sum of $617,500 which, together with interest, totaled $1,141,228, and reserved to him his right to proceed to recover his legal fees and expenses pursuant to the Equal Access to Justice Act (EAJA) and Value Engineering Change Proposals (VECP).

The Government paid Bianchi the $1,141,228.00. Two years later, the United States was sued in the United States Court of Federal Claims by Bank of America National Trust & Savings Association, the financial institution which loaned money to Bianchi to service the underlying DPSC contracts. The Bank claimed that, pursuant to assignments given it by Bianchi in connection with the underlying loan transactions, the Government had been obligated to pay the $1,141,228.00 to it rather than to Bianchi. The United States answered the Complaint disputing the claim of the Bank and brought a Third-Party action against Bianchi. In that Third-Party action, the Government claimed that it had paid Bianchi erroneously given the nature of the assignments to the Bank and prayed that, should the Court decide in favor of the Bank, the Government should have judgment against Bianchi for monies previously paid to him pursuant to the Stipulation to Board Decision. The Government also claimed that because of a superior debt allegedly owed by Bianchi to the Small

Business Administration (SBA), the Government erred in failing to offset the monies due to Bianchi against the monies allegedly owed by Bianchi to the SBA and sought return of those sums. All parties to the action before the United States Court of Federal Claims brought Motions for Summary Judgment. The United States Court of Federal Claims entered summary judgment in favor of the United States and against both Bianchi and the Bank.

Bianchi and the Bank appealed to the United States Court of Appeals for the Federal Circuit. In *Bank of America vs. United States*, 23 F.3d 380 (Fed. Cir. 1994), the Federal Circuit Court reversed the Decision of the United States Court of Federal Claims. As to Mr. Bianchi's appeal, the Federal Circuit ruled that Bianchi and the Government had entered into an arm's length agreement settling the contract dispute claims and that the United States could not, under the guise or pretext of bringing an action in a different forum, attempt to undo, avoid or defeat the terms of that arm's length agreement.[2]

As a result of the Opinion of the United States Court of Appeals for the Federal Circuit, at 23 F.3d 380, Bianchi was not required to repay the Government the sums paid him pursuant to the arm's length Stipulation to Board Decision and ASBCA Order. In the interim, Bianchi prosecuted his Equal Access to Justice Act claim and his Value Engineering Change Proposal claim. By an Opinion entered September

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[2] The Federal Circuit Court also ruled in favor of Bank of America upon its appeal, holding that the United States was aware of the assignments to the Bank and, irrespective of the Government's independent obligation to Bianchi by settlement, the Bank was still entitled to the benefits of its assignments. *Bank of America vs. United States*, 23 F.3d at 383-384.

25, 1990, (App. I, *infra*, 96a), the ASBCA entered its Opinion awarding Bianchi $475,724.00 in litigation fees expenses. However, the Government refused to pay Bianchi the money awarded him by the ASBCA pursuant to his EAJA fee application. Instead, the United States asserted the same setoff that it asserted against Bianchi at the United States Court of Federal Claims, the same setoff which had been rejected by the United States Court of Appeals for the Federal Circuit.

Because of the Government's failure and refusal to pay, Bianchi exhausted his administrative remedies and then filed an action in the nature of mandamus in the District Court for the District of Nevada, seeking an order from the District Court compelling the Comptroller General to pay him the monies previously awarded to him by the ASBCA upon his EAJA application. At District Court, both Bianchi and the United States sought summary judgment. Bianchi alleged, in essence, that the Opinion of the Federal Circuit was res judicata as to his right to receive the benefits promised to him pursuant to the Stipulation to Board Decision and the Opinion of the ASBCA. The United States asserted the position that, while it had promised to allow Bianchi to pursue his EAJA claim, it did not promise to pay that claim if he prevailed.

The District Court entered summary judgment in favor of the United States and Bianchi appealed. In a published Opinion, *Bianchi vs. Perry*, 140 F.3d 1294 (9th Cir. 1998), the United States Court of Appeals for the Ninth Circuit held that the Opinion of the Federal Circuit Court finding Bianchi to be entitled to the benefits of the ASBCA Stipulation to Board Decision was res judicata and that the Government could not offset the alleged SBA claim as a pretext to avoid payment of its obligations to Bianchi arising from the settlement.

Also in the interim, Bianchi pursued his Value Engineering Change Proposal claim. By Opinion entered February 10, 1993, the ASBCA awarded Mr. Bianchi $58,613.00 (App. J, *infra*, 118a). Again, the United States refused to pay, claiming the same setoff that had been rejected by the Federal Circuit Court (and subsequently rejected by the Ninth Circuit Court in *Perry*).

Accordingly, Bianchi brought a Complaint in the District Court for the District of Nevada in the nature of mandamus, seeking an order compelling the Comptroller General to pay him the monies awarded him by the ASBCA upon his VECP application. In answer, the United States filed a Counterclaim for Interpleader and Offset, alleging the same offset that was eventually rejected by the Ninth Circuit Court in *Perry*, that is, the same offset previously rejected by the United States Court of Appeals for the Federal Circuit, and interpleading Bank of America upon the premise that Bianchi's assignments to the Bank colorably required the Government to pay the VECP award to the Bank rather than Bianchi.[3] The parties brought Cross-Motions for Summary Judgment. Bianchi argued the preclusive or res judicata effect of the Opinion of the Federal Circuit Court (*Bank of America vs. U.S.*, supra) to no avail. The District Court granted summary judgment in favor of Bank of America and Bianchi appealed.

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[3] The Opinion of the United States Court of Appeals for the Federal Circuit, at 23 F.3d 380, resolved the Government's contention of liability to the Bank; the Federal Circuit Court effectively held that the Government remained liable to the Bank upon the assignments but was independently liable to Bianchi pursuant to the arm's length Stipulation to Board Decision.

In its Opinion, filed December 11, 1998, (163 F.3d 564), the United States Court of Appeals for the Ninth Circuit affirmed the summary judgment in favor of Bank of America. Moreover, the Ninth Circuit Court held that Bianchi was precluded from bringing an action in District Court because the District Court lacked jurisdiction to liquidate a claim against the United States in excess of $10,000.00. *Bianchi vs. Walker*, 163 F.3d at 569.

The Opinion of the Ninth Circuit Court of Appeals in *Bianchi vs. Walker* is inconsistent with the Opinion of the same Circuit in the related case of *Bianchi vs. Perry*, supra, and inconsistent with the Opinion of the United States Court of Appeals for the Federal Circuit in *Bank of America vs. United States*, supra. Both the Federal Circuit Court and the Ninth Circuit Court in *Perry* recognized the enforceability of the Stipulation to Board Decision as that Stipulation was incorporated into the Opinion of the ASBCA. Both Courts held that the United States was required to honor its settlement agreement with Bianchi and could not avoid its obligations by litigating offsetting claims in other forums. However, the Court in *Bianchi vs. Walker*, supra, disregarded the res judicata effect of the prior Ninth Circuit Opinion and the Opinion of the Federal Circuit and allowed the Government to avoid its obligation to Bianchi by bringing a third-party claim and paying the monies over to the third-party, a rationale specifically rejected by the Federal Circuit:

> "Whatever the reason for its failure to protect itself, the government cannot now renege on its committment to honor its settlement with Bianchi, into which it entered voluntarily and with full knowledge of the facts."

Bank of America v. United States, 23 F.3d at 383-384.

Because of the inconsistencies between the Opinion of the United States Court of Appeals for the Ninth Circuit in *Walker* and the Opinion of the Federal Circuit in *Bank of America vs. U.S.;* because of the contradictions between the holdings in *Bianchi vs. Perry* and *Bianchi vs. Walker*, supra; and because the Court in *Bianchi vs. Walker* failed to recognize the res judicata or preclusive effect of *Bank of America vs. United States*, as recognized by the same Court in *Perry*, Bianchi brought a Petition for Rehearing and Suggestion for Rehearing En Banc. By Order entered February 17, 1999, the United States Court of Appeals for the Ninth Circuit denied the Petition for Rehearing and declined Rehearing En Banc. App. G, *infra*, 91a.

REASONS FOR GRANTING THE PETITION:

The Opinion of the Court in *Bank of America v. Walker* is Clearly Erroneous

The published Opinion of the United States Court of Appeals for the Federal Circuit in *Bank of America vs. United States*, supra, established that the Government was required to honor its settlement with Bianchi and that, as between the United States, Bianchi and Bank of America in respect to claims arising out of or in connection with the Stipulation to Board Decision of September 1988, the Government was obligated to Bank of America pursuant to Bianchi's assignment to the Bank and remained liable to Bianchi under the terms of the independent Stipulation to Board Decision, an arm's length transaction between Bianchi and the United States free from fraud, concealment or undue influence. See, 23 F.3d at 383.

In *Bianchi vs. Perry*, supra, the Ninth Circuit recognized the res judicata or preclusive effect of the decision of the Federal Circuit in *Bank of America vs. U.S.*, supra. In its Opinion, the Ninth Circuit in *Perry* rejected the Government's contention that it was allowed to setoff against its 1988 Stipulation with Bianchi and the EAJA award arising out of and as a result of that Stipulation. However, the Ninth Circuit in *Bianchi vs. Walker* reached a different conclusion. Rather than giving preclusive effect to the prior Opinions of the Federal Circuit in *Bank of America vs. United States* and the Ninth Circuit, itself, in *Bianchi vs. Perry*, supra, the Panel hearing the matter of *Bianchi vs. Walker* affirmed the summary judgment in favor of Bank of America and held further that the District Court lacked jurisdiction to entertain Bianchi's claim in the nature of mandamus, erroneously characterizing the mandamus action as an effort to liquidate a

claim for damages against the United States in excess of $10,000.00.

The Court held that "[b]ecause Bianchi seeks damages totaling more than $10,000.00 based on the settlement agreement, the Complaint for a Writ of Mandamus should have been filed in the Court of Federal Claims." *Bianchi vs. Walker*, 163 F.3d at 569. However, that holding is clearly erroneous.

The Contract Disputes Act, 41 U.S.C. §601 et. seq. established Boards of Contract Appeals to provide Government contractors with speedy, efficient and economical means for handling disputes relating to Government contracts, and that among such devices is an election at the contractor's option permitting access to either a Board of Contract Appeals or the United States Court of Federal Claims; that in the event that the contractor elects to utilize a Board of Contract Appeals, Congress provided the Board with authority to grant the same relief as is currently available to litigants asserting contract claims before the United States Court of Federal Claims. 41 U.S.C. §607(d); 41 U.S.C. §609(1); *E-Sytems, Inc.* (1979) ASBCA 79-1 CCH BCA Dec. ¶13806. See, also, *Nome Pharmacy, Inc.* (1980) ASBCA 80-1 CCH BCA Dec. ¶14279. Bianchi exercised that election.

The holding is also erroneous because Bianchi's claim had already been liquidated by the March 10, 1993, award of the ASBCA.

41 U.S.C. §607 provides, in relevant portion:

"(a)(1) Except as provided in subparagraph

(2) an agency board of contract appeals

may be established within an executive agency...."

(d) Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims...."

41 U.S.C. §607. (Emphasis supplied).

41 U.S.C. §609(1) provides:

"(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under §605 of this Title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary."

The provisions of 41 U.S.C. §609(1) granted Bianchi an election to proceed either before a Board of Contract Appeals or the United States Court of Federal Claims. Bianchi exercised that option, proceeded before a Board of Contract Appeals and obtained an Award from that court of competent jurisdiction. The United States Court of Appeals for the Ninth Circuit in *Walker* erred in requiring Bianchi to relitigate his entitlement before the United States Court of

Federal Claims and in characterizing the Complaint in the Nature of Mandamus, which was filed to enforce a previously obtained Award, as a complaint to liquidate a claim for damages in excess of $10,000.00. The Court is clearly erroneous in holding that "[b]ecause Bianchi seeks damages totaling more than $10,000 based on the settlement agreement, the Complaint for a Writ of Mandamus should have been filed in the Court of Federal Claims." 163 F.3d at 569.

The holding is clearly erroneous because Bianchi's claim had been liquidated by the Award of the ASBCA based upon his written Stipulation with the Government. The Complaint in District Court did not seek damages totaling more that $10,000 based upon a settlement agreement. Rather, the Complaint in the Nature of Mandamus sought an order of the Court compelling the Government officer to process payment of the Award. The underlying contract dispute claim had been previously resolved by the ASBCA pursuant to a Stipulation between Bianchi and the Government.

28 U.S.C. §1361 governs the jurisdiction of the United States District Courts over actions in the nature of mandamus. That statute provides, in its entirety:

> "The District Courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff."

28 U.S.C. §1361.

Mandamus is available to compel an officer of the

United States to perform a duty if the Plaintiff's claim is clear and certain, the duty of the officer is ministerial and so plainly prescribed as to be free from doubt and no other adequate remedy is available. *Fallini vs. Hodel*, 783 F.3d 1343 (9th Cir. 1986), and will issue only to compel the performance of a non-discretionary duty. *Heckler v. Ringer,* 466 U.S. 602, 616 (1984); *Pittson Coal Group v. Sebben,* 488 U.S. 105 (1988). The processing of payment after a final determination or award is a ministerial act which comes within the scope of a statute providing that the District Court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff. *See, Weisbord vs. Heckler*, 655 F.Supp. 598 (E.D. Pa. 1986).

Therefore, it is clear that jurisdiction to entertain the Complaint in the Nature of Mandamus was vested in District Court. First, the Plaintiff's entitlement was clear and certain; Bianchi had been granted an Award by a Board of Contract Appeal, a Court of competent jurisdiction to entertain the Contracts Dispute Act claims pursuant to the provisions of 41 U.S.C. §601 et. seq. Second, the duty of the officer was ministerial and non-discretionary, that is, processing payment of the Award previously given Bianchi and, thus, was so plainly prescribed as to be free from doubt. Third, Bianchi had exhausted his administrative remedies, had already liquidated his claim by an Award of a Board of Contract Appeal of competent jurisdiction and had no other adequate or available remedy.

Because the contract claim as settled by the Stipulation to Board Decision was incorporated into an Award rendered by a Board of Contract Appeals, the claim had been liquidated. All that remained to be done was the processing of payment. Therefore, by determining that the District Court

lacked jurisdiction to entertain the claim and requiring Bianchi to bring the claim before the United States Court of Federal Claims, the Ninth Circuit Court in *Bianchi vs. Walker* (a) misapprehended the fact that the contract claim was resolved and liquidated; (b) disregarded the statute under which Bianchi elected to proceed before a Board of Contract Appeals rather than before the United States Court of Federal Claims; and (c) required Bianchi to relitigate a claim previously litigated before the Armed Services Board of Contract Appeals in another court of co-extensive jurisdiction over the claims.

Requiring Bianchi to proceed before the United States Court of Federal Claims to enforce the award he had already obtained is to require him to assert an equitable remedy in a Court that is devoid of equitable jurisdiction. See, e.g., *United States vs. King*, 395 U.S. 1 (1969).

Moreover, the Court in *Bianchi vs. Walker*, supra, is erroneous in finding that Bianchi's contention that the Government was required to pay the money due on the VECP claims was not presented to the Court of Federal Claims or to the Federal Circuit in *Bank of America vs. United States*, supra. See, *Bianchi vs. Walker*, 163 F.3d at 569.

This very same argument was presented by the United States to the United States Court of Appeals for the Federal Circuit in *Bank of America vs. United States*, supra. After the Federal Circuit rendered its Opinion in that case (23 F.3d at 380), the United States attempted to litigate its second or contingent claim for relief against Bianchi in its Third-Party Complaint then pending before the Claims Court. The Government argued that only its first, non-contingent claim for relief, that is its claim that it paid Bianchi in error, was before the Court on appeal. However, the Federal Circuit

Court of Appeal rejected that rationale. By Order entered September 30, 1994, (App. K, *infra*, 170a) the United States Court of Appeals for the Federal Circuit held:

> "The government correctly argues that only its third-party claim, and not its contingent claim, was before us on appeal; it is clear from our decision, however, that the contingent claim must fail as well since it is based on identical grounds. Indeed, all that remains of the government's claims against Bianchi is the purely ministerial act of entering judgment against the government in the Court of Federal Claims [citations omitted]."

The Honorable Ninth Circuit Court of Appeals in the *Walker* matter overlooked the clear imperative of the Federal Circuit's holding, that is, that Bianchi was entitled to the benefit of his arm's length agreement with the Government irrespective of the Government's obligation to the Bank. The Ninth Circuit Court in *Perry* understood that fact and, in its Opinion, actually addressed the VECP claim at issue before the Circuit in the *Walker* case. The *Perry* Court wrote:

> "Any honest and competent lawyer would understand this settlement agreement in the same way. It means Bianchi gets $617,500, plus interest, plus whatever he can win on his `Value Engineering Change Proposal claims,' plus whatever he can win on his Equal Access to Justice Act claim...The Government argues from lack of parallelism in the phrasing of the different paragraphs of the settlement agreement that Bianchi is only entitled to the $617,500 without setoff, not the

> EAJA award...In the context of this dispute, the word "pursue" meant that Bianchi had to win an EAJA award, but once the award was established, the goverment would pay it...Given the settlement agreement [the] strained construction [urged by the Government] would encourage sharp practice. Thus we conclude that there is no difference in whether the government agreed to pay the $617,500 and whether it agreed to pay the EAJA award, once Mr. Bianchi had won a liquidated amount. The setoff issue is the same as to both. To the extent that the government had a claim against Bianchi for its unpaid SBA loan, the settlement agreement no more allows the government to lie in the weeds with a setoff against the EAJA award than with the $617,500."

Bianchi vs. Perry, 130 F.3d at 1297-1298. (Emphasis added).

The *Perry* Court, thus, gave preclusive effect to the Opinion of the United States Court of Appeals for the Federal Circuit in *Bank of America vs. United States*, supra, in which the Federal Circuit wrote:

> "The government could easily have taken appropriate steps to avoid incurring any liability to the Bank...The government did not do so...Whatever the reason for its failure to protect itself, the government cannot now renege on its commitment to honor its settlement with Bianchi, into which it entered voluntarily and with full knowledge of the facts [including the assignments to the Bank].

> 'To permit (the government) to escape its obligation under the settlement would seriously decrease the willingness of parties to settle litigation on mutually agreeable terms and thus weaken the efficacy of settlements generally.' [citations omitted]"

Bank of America vs. United States, 23 F.3d at 383-384.

There is no distinction in the Stipulation to Board Decision and the Ninth Circuit Court's rationale as between Bianchi's right to collect the EAJA award, once liquidated, and his right to collect upon his Value Engineering Change Proposal, once liquidated. Both were benefits derived from the same Stipulation to Board Decision. The Opinion of the Ninth Circuit in *Perry* clearly establishes the viability of the agreement, as a whole, just as the Federal Circuit did in the earlier Opinion of *Bank of America vs. United States*, supra.

THE QUESTION PRESENTED IS IMPORTANT

In *Bowen vs. Massachusetts*, 487 U.S. 879 at 930 (1988) (dissenting opinion) Justice Scalia observed that "[n]othing is more wasteful than litigation about where to litigate."; see, also, *Christianson vs. Colt Industries Operating Corp.*, 486 U.S. 800, 818-19 (1988). With the Ninth Circuit internally at odds over where Bianchi is required to litigate, that is whether before a Board of Contract Appeals or before the United States Court of Federal Claims, the decisional authority of the Ninth Circuit in *Walker* appears to contradict the very terms of the statute granting the contractor an election as to where to proceed and, if not corrected, may lead to the necessity of a contractor having to litigate in both forums although Congress clearly intended to and granted a contractor the election to proceed in one or the other.

Moreover, a gross injustice is done to the Petitioner in this case. If the Opinion of the Ninth Circuit in *Bianchi vs. Walker* is allowed to stand, his claim in District Court will be dismissed for lack of subject matter jurisdiction and he will be faced with an election to abandon his efforts to collect the Award given him or forced to re-litigate in the United States Court of Federal Claims his entitlement to an Award previously received, although a Court of co-existent and concurrent jurisdiction already litigated the issue.

In sum, the authorities are at odds and in conflict on a matter of importance to the Courts, that is the subject matter jurisdiction of a District Court to entertain claims in mandamus arising out of Awards of Boards of Contract Appeals, and to contractors who are now faced with a dilemma in having to determine whether or not an election as granted by statute will be found by an appellate Court to be

erroneous, thus, requiring the contractor to guess as to which Court will be found to have jurisdiction and putting the contractor through the added expense of re-litigating an issue previously decided. Therefore, the Court should grant the Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 97-17024
[Filed December 11, 1998]

Maurice BIANCHI, f/d/b/a M. Bianchi of California, Plaintiff-counter-defendant-Appellant,	)
v.	)
David M. WALKER,[1] Comptroller General of the United States General Accounting Office, Defendant-counter-claimant- Appellee,	)
v.	)
Bank of America National Trust & Savings Association, Counter-defendant/claimant in Interpleader-Appellee.	)

[1] David M. Walker is substituted for Charles Bousher, former Comptroller General of the United States General Accounting Office, pursuant to Fed. R.App. P. 43(c)(1).

Opinion 12/11/98

Argued and Submitted Nov. 5, 1998.
Decided Dec. 11, 1998.

OPINION

Government contractor filed complaint for writ of mandamus, seeking order to compel United States to pay amount awarded to him by Armed Services Board of Contract Appeals (ASBCA). Government filed counter-claim for interpleader, requesting determination as to whether bank, as contractor's assignee, should be awarded amount owed to contractor. The United States District Court of the District of Nevada, Lloyd D. George, J., entered summary judgment for bank on its claim in interpleader. Contractor appealed. The Court of Appeals, Alarcon, Circuit Judge, held that: (1) district court lacked jurisdiction over contractor's complaint for writ of mandamus, but it did have jurisdiction over government's counterclaim for interpleader; (2) Court of Appeals had jurisdiction over appeal of district court's grant of summary judgment to bank on its claim in interpleader; and (3) prior Ninth Circuit and Federal Circuit opinions were not res judicata as to bank's claim to money owed to contractor under value engineering change proposal (VECP) provisions of his contracts with federal government.

Affirmed.

See also: 23 F.3d 380, 140 F.3d 1294.

1. Federal Courts 973

In context of government contractor's complaint for writ of mandamus, seeking order to compel United States to

pay amount awarded to him by Armed Services Board of Contract Appeals (ASBCA), district court had jurisdiction over government's counter-claim for interpleader, requesting determination as to whether bank, as contractor's assignee, should be awarded amount owed to contractor, 28 U.S.C.A. § 1345; Fed.Rules Civ.Proc.Rule 22 U.S.C.A.

2. Federal Courts 1139

District court lacked subject matter jurisdiction over government contractor's complaint for writ of mandamus, seeking order to compel United States to pay amount awarded to him by Armed Service Board of Contract Appeals (ASBCA), since contractor sought damages totaling more than $10,000 based on settlement agreement, such that compliant for writ of mandamus should have been filed instead in the Court of Federal Claims. 28 U.S.C.A. §§ 1346(a)(2), 1491(a)(1).

3. Federal Courts 776

Appellate review of district court's order granting or denying summary judgment is de novo. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

4. Federal Courts 759.1

On Appeal of summary judgment order, Court of Appeals may affirm judgment of district court on any basis established by the record.

5. Federal Courts 542

Though district court lacked subject matter jurisdiction over government contractor's mandamus complaint, seeking to compel United States to pay amounts awarded by Armed Services Board of Contract Appeals (ASBCA), Court of Appeals nonetheless had jurisdiction over appeal of district court's grant of summary judgment to bank on its interpleader claim, since trial court had jurisdiction to consider merits of bank's claim that, as contractor's assignee, it was entitled to the amount owing to contractor, and court's decision that bank was entitled to proceeds of ASBCA award disposed of the only issues that were properly before it. 28 U.S.C.A. § 1346 (a)(2).

6. Federal Courts 735

Assignee-bank's claim to money owed to government contractor under value engineering change proposal (VECP) provisions of his contracts with federal government was not barred by prior appellate decision regarding parties' rights in monies awarded to contractor in his appeals before the Armed Services Board of Contract Appeals (ASBCA), since prior appellate decision did not reach question whether government was liable to pay amounts sought on VECP claims.

7. Federal Courts 766, 802

On appeal of order granting summary judgment, Court of Appeals must determine, viewing evidence in light most favorable to nonmoving party, whether there are any genuine issues of material fact and whether district court correctly applied relevant substantive law. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

8. Judgment 707

Prior appellate decision, issue in connection with government contractor's action to collect fees and expenses he was awarded under Equal Access to Justice Act (EAJA) in accordance with settlement agreement with government, was not res judicata on question whether bank, as contractor's assignee, was entitled to recover amount owing on certain claim under government contract pursuant to assignment agreement, since bank was not party or privy to prior EAJA action; bank and government were not in privity, but were adverse parties. 28 U.S.C.A. § 2412.

9. Judgment 540

Res judicata only applies to persons who were parties or their privies in a prior action involving the same claim.

Gerson B. Kramer, Braude & Margulies, Washington, D.C.; Scott Michael Cantor and George E. Graziadei (on the briefs), Graziadei & Cantor, Ltd., Las Vegas, Nevada, for the plaintiff-counter-defendant-appellant.

Mark A. Melnick, Assistant Director and David M. Cohen, Director (on the briefs), United States Department of Justice, Washington, D.C., for the defendant-counter-claimant-appellee.

Dennis L. Olson and Diana L. Sullivan (on the briefs), Jones Vargas, Las Vegas, Nevada, for the counter-defendant-claimant-appellee.

Appeal from the United States District Court for the District of Nevada; Lloyd D. George, District Judge, Presiding. D.C. No. CV-94-00747-LDG.

Before: Arthur L. Alarcon, Diarmuid F. O'Scannlain and Ferdinand F. Fernandez, Circuit Judges.

ALARCON, Circuit Judge:

Maurice Bianchi, formerly doing business as M. Bianchi of California, ("Bianchi") appeals from the order granting summary judgment in favor of Bank of America ("Bank"), and the denial of his motions for summary judgment against the Bank and Charles Bousher, Comptroller General of the United States of America, the United States of America, and the United States General Accounting Office ("Government") and his motion for a new trial or, in the alternative, to alter and amend findings of facts and conclusions of law, and to amend the judgment. Bianchi contends that the district court erred in ruling that the Bank was entitled to recover the money owed to Bianchi by the Government based on the assignment agreement between the Bank and Bianchi. We affirm because we conclude that Bianchi was barred by the collateral estoppel doctrine from contending that the assignment agreement was not valid.

I

A recitation of the factual and procedural background of this case is essential to understanding the issue before this court. This dispute arose out of the contracts between Bianchi and the Government. Prior to the filing of this action, this same dispute spawned three separate actions, two in the

federal courts and one in a California state court. In 1979 and 1980, Bianchi was awarded three contracts by the Defense Personnel Support Center to produce clothing for the military. These contracts were assigned to the Bank by Bianchi as collateral for money loaned to Bianchi. The Bank properly notified the Government of this assignment under the Assignment of Claims Act. During 1980, the Bank loaned Bianchi additional money on these contracts which was guaranteed by the Small Business Administration ("SBA").

A dispute arose regarding Bianchi's performance of certain of these contracts. Bianchi filed appeals before the Armed Services Board of Contract Appeals ("ASBCA") in ASBCA case numbers 26362, 26363, 26364, 26365, 26366, 26505, 26506, 26513, 26642, 29932, 29933, and 29934 ("the ASBCA claims"). These appeals did *not* include Bianchi's Value Engineering Change Proposal ("VECP") claims.

On September 27, 1988, the Government and Bianchi entered into an agreement to settle the ASBCA claims. The settlement provided for a monetary award to Bianchi of $617,500 plus interest for a total of $1,141,330.83. The settlement contract expressly reserved Bianchi's right to pursue his VECP claims, and to apply for an award of Bianchi's legal fees and expenses under the Equal Access to Justice Act.[2]

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[2] The settlement agreement provides:

1. The parties agree that Mr. Maurice Bianchi, as the successor to M. Bianchi of California is entitled to recover $ 617,500.00 on his claims in the following appeals: ASBCA Nos. 26362, 26363, 26364, 26365, 26366, 26505, 26506, 26513, 26642, 29932, 29933, and

The settlement agreement was integrated in the decision of the ASBCA. The Government paid Bianchi $1,141,220.83 to settle each of the claims identified in the settlement agreement. This amount did not include any payment to satisfy Bianchi's VECP claims.

On November 21, 1990, the Bank filed an action in the United States Court of Federal Claims against the Government in which it alleged that under its assignment agreement with Bianchi, it was entitled to be paid the amount of $1,141,220.83 awarded to Bianchi by the ASBCA. *See Bank of America Nat'l. Trust and Sav. Ass'n. v. United States,* 23 F.3d 380, 382 (Fed.Cir. 1994) (*"Bank of America"*). In its answer, the Government denied liability to the Bank based on

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29934; that Mr. Bianchi is entitled to interest . . . at the rates prescribed by the Secretary of the Treasury . . . and that the parties waive their rights to seek reconsideration of this stipulated decision of the Board or to appeal that stipulated decision;

2. This settlement is without prejudice to Mr. Bianchi's right to pursue any and all Value Engineering Change Proposal Claims under his contracts with DPSC; and

3. This settlement is without prejudice to Mr. Bianchi's right to pursue an application under the Equal Access to Justice Act to recover whatever legal fees and litigation expenses to which he may be entitled in connection with these claims and appeals. . .

It is the Board's decision pursuant to 41 U.S.C. § 607(d), § 612(b), and the parties' stipulation and agreement, that the appeals are sustained. In the nature of a consent judgment the Board makes a monetary award in the amount of $ 617,500 with interest from 18 June 1981.

its contention that the SBA had a superior security interest in the proceeds of the ASBCA claims. The Government also filed a third-party claim against Bianchi to recover the $1,141,220.83 it had paid to him. *See id.*

The United States Court of Federal Claims granted the Government's motion for a summary judgment. It held that the SBA had a superior security interest in money owing to Bianchi to that asserted by the Bank. The Court of Federal Claims also ordered Bianchi to return the $ 1,141,220.83 to the Government. *See Bank of America,* 23 F.3d at 382.

The Federal Circuit reversed the judgment of the Court of Federal Claims. It held that the Bank was entitled to be paid the amount awarded by the ASBCA pursuant to its rights under the assignment. The Federal Circuit also determined that Bianchi was entitled to retain the money paid to him by the Government under the terms of the settlement agreement. The court further held that the SBA's security interests in the ASBCA claims were subordinate to the Bank's rights under the assignment. *Id.* at 384. In addition, the Federal Circuit decided that the Government could not set off Bianchi's debt to the SBA because Bianchi's right to receive the total amount awarded to him pursuant to the settlement agreement was independent of any liability to the SBA. *Id.* at 385.

Bianchi initiated this action by filing a complaint in the nature of a writ of mandamus for an order to compel the United States to pay the amount awarded to him by the ASBCA. The ASBCA determined that the Government was liable to Bianchi in the amount of $ 58,613.03 under a VECP provision of an express contract. The Government refused to

make payment.

The Government filed an answer and a counterclaim for interpleader. In its counterclaim, the Government requested that the district court determine whether the Bank should be awarded the amount owed to Bianchi on the VECP claim pursuant to the assignment agreement between the Bank and Bianchi. The Government requested that if the court determined that the Bank was entitled to the amount due under the ASBCA decision, the Government should be discharged from any liability to Bianchi. The Government further requested that, if the district court concluded that the Bank was not entitled to the amounts due under the ASBCA decision, the court should offset the amount Bianchi owes to the SBA from the $ 58,613.03 sought by Bianchi in his complaint for a writ of mandamus.

In its claim, the Bank asserted that "the Bank's claim to the interpleader stake is prior to any other claim and that the Bank is entitled to all funds at issue held by the Government." In his answer to the Bank's claim in interpleader, Bianchi asserted that the decision of the United States Court of Appeals for the Federal Circuit in *Bank of America* "speaks for itself" regarding the Bank's claim that under the assignment agreement it was entitled to the amount owing to Bianchi.

The Bank moved for summary judgment. It argued that it was entitled to the money held by the Government because, under the doctrine of collateral estoppel, Bianchi was precluded from relitigating the question whether the assignments were valid.

Bianchi filed a motion for summary judgment against the Government. He asserted that he was entitled to the $58,613.03 because the Government had agreed to pay the VECP claim as part of a stipulated agreement that was integrated into the decision of the ASBCA. Bianchi also requested summary judgment on the Government's claim that it was entitled to an offset.

Bianchi also filed a cross-motion for a summary judgment against the Bank. In the court below, Bianchi argued that he was entitled to summary judgment on the Bank's claim in interpleader because the Bank breached the terms of the assignment agreement. However, subsequent to the denial of his motion for summary judgment and prior to his motion for a new trial, the California Court of Appeals found that the Bank had not breached the assignment agreement. *See Bianchi v. Bank of America Nat'l. Trust and Savings Ass'n.*, G014893 (Cal.Ct.App.1997) (unpublished). Bianchi now asserts that he is entitled to recovery on two different grounds: (1) the Federal Circuit's decision in *Bank of America* establishes that he is entitled to recover on the settlement agreement regardless of whether the Government remains liable to the Bank; and (2) the Bank's recovery in *Bank of America* was in full settlement of the assignment agreement and, therefore, the assignment was discharged. Bianchi no longer contends that the Bank breached the assignment agreement.

The district court granted the Bank's motion for a summary judgment. It also denied Bianchi's motion for summary judgment against the Government and his cross-motion for a summary judgment against the Bank.

In explaining its decision, the district court reasoned that the Bank was entitled to summary judgment because "Bianchi is collaterally estopped from arguing that the assignments were not valid." The court stated that precise issue had been resolved against Bianchi in *Bank of America*, 23 F.3d at 384.

The district court's judgment reads as follows:

> Pursuant to this Court's Order, JUDGMENT is entered in favor of Counterdefendant/Claimant in Interpleader Bank of America National Trust and Savings Association, and against Plaintiff Maurice Bianchi fdba as M. Bianchi of California (Bianchi) and Defendant/Counterclaimant Charles Bousher, Comptroller General of the United States General Accounting Office. Defendant/Counterclaimant Charles Bousher shall pay to the Bank of America National Trust and Savings Association the amount of $ 58,613.03, plus interest due from November 17, 1987.

The court's judgment is silent regarding Bianchi's complaint for a writ of mandamus.

Bianchi filed a motion for a new trial or, in the alternative, to alter and amend findings of fact, conclusions of law, and to amend judgment. The district court denied these motions and this timely appeal followed. This motion makes no reference to Bianchi's complaint for a writ of mandamus.

II

Before discussing the merits of this appeal, we have a duty to determine *sua sponte* whether the district court entered a final decision in this matter. The parties have represented that we have jurisdiction pursuant to 28 U.S.C. § 1291. None of the parties have argued before this court that the district court's judgment did not encompass a disposition of Bianchi's complaint for a writ of mandamus.

[1] The district court had jurisdiction over the Government's counterclaim for interpleader in this matter pursuant to 28 U.S.C. § 1345 and Rule 22 of the Federal Rules of Civil Procedure. A person who is subject to claims from more than one claimant may require them to interplead their claims to avoid multiple liability. Fed. R. Civ. P. 22. A defendant exposed to liability from more than one claimant may obtain interpleader relief by filing a counterclaim. *Id.*

[2] The question we must address is whether this order was final as to Bianchi's claim for a writ of mandamus. There is no express indication in the record of the district court's disposition of the petition for a writ of mandamus.

[3, 4] Our review of a district court's order granting or denying summary judgment is *de novo*. See *Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir. 1998). "We may affirm the judgment of a district court on any basis established by the record." *DELTA v. Humane Soc. of U.S., Inc.,* 50 F.3d 710, 712 (9th Cir. 1995).

The record shows that the district court lacked subject matter jurisdiction over Bianchi's complaint for a writ of

mandamus. A district court has jurisdiction over an action filed against the United States arising out of a contract dispute where the amount in dispute does not exceed $ 10,000. 28 U.S.C. § 1346(a)(2). The United States Court of Federal Claims has jurisdiction over any claim against the United States concerning an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1). Because Bianchi seeks damages totalling more than $ 10,000 based on the settlement agreement, the complaint for a writ of mandamus should have been filed in the Court of Federal Claims. *See id.*

[5] We conclude that we have jurisdiction over this appeal. The district court had subject matter jurisdiction to consider the merits of the Bank's claim that it was entitled to the amount owing to Bianchi under the assignment. It lacked subject matter jurisdiction to consider a claim, however disguised, that the Government owed Bianchi in excess of $10,000 based on the VECP provisions of the contract. The district court's decision that the Bank was entitled to the proceeds of the VECP award disposed of the only issues that were properly before it.

III

[6, 7] Bianchi contends that the Bank's claim to the money owed to Bianchi under the VECP provisions of his contracts with the Government as Bianchi's assignee is barred by the decision of the United States Court of Appeals for the Federal Circuit in *Bank of America*. A grant of summary judgment is reviewed *de novo*. *See Margolis*, 140 F.3d at 852. Our review is governed by the same standard used by the trial court under Federal Rules of Civil Procedure 56(c). *See Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th

Cir. 1997), *cert. denied*, __ U.S. ___, 118 S.Ct. 1034, 140 L.Ed.2d 101 (1998); *Parker v. United States*, 110 F.3d 678, 681 (9th Cir. 1997). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See *Margolis*, 140 F.3d at 852; *see also Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

Bianchi's contention that the Government was required to pay the money due on the VECP claims was not presented to the Court of Federal Claims or the Federal Circuit in *Bank of America*. Therefore, Bianchi's reliance on the doctrine of res judicata is misplaced.

The Federal Circuit's decision was limited to an analysis of Bianchi's right to retain the amount the Government agreed to pay to settle the pending ASBCA claims pursuant to the first paragraph of the settlement agreement. It did not determine whether the Government was required to pay Bianchi any amount he might recover under the reservation-of-rights provisions of the second paragraph of the settlement agreement, notwithstanding the Bank's rights under its assignment agreement with Bianchi. The question whether the Government is liable to pay Bianchi the $58,613.03 Bianchi seeks to recover under its VECP claims has not been presented in the United States Court of Federal Claims in an action against the Government as required pursuant to 28 U.S.C. § 1491(a)(1), nor has this issue been reviewed by the Federal Circuit.

IV

[8, 9] Bianchi also maintains that this court's decision in *Bianchi v. Perry,* 140 F.3d 1294 (9th Cir. 1998) is res judicata on the question whether the Bank is entitled to recover the amount owing on the VECP claim pursuant to the assignment agreement. This contention lacks merit. *Bianchi v. Perry* cannot serve as a bar to the Bank's claim because it was not a party or privy to that action.[3] Res judicata only applies to persons who were parties or their privies in a prior action involving the same claim. *See In Re Schimmels,* 127 F.3d 875, 881 (9th Cir. 1997). The Bank and the Government are not in privity, they are adverse parties. Accordingly, neither *Bank of America* nor *Bianchi v. Perry* bars the Bank's rights under the assignment agreement.

V

Bianchi also asserts that the district court erred in denying his motion for a new trial, or in the alternative, his motion to alter or amend the district court's findings of fact and conclusions of law. The district court did not err in denying Binachi's motion because his contentions are without merit.

Bianchi claims that the district court was not aware of the prior judgment in the Bank of America case in which the

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[3] We note also that *Bianchi v. Perry* did not involve the claim presented in this matter. The issue presented in *Bianchi v. Perry* was whether the Government was entitled to set off the debt owed to the United States against Bianchi's right to statutory fees and expenses under the EAJA. *Id.* at 1299

Government was held liable to the Bank for a certain sum. Bianchi claims that this payment discharged the assignment and any further recovery by the Bank would put it in a position to receive double recovery.

Bianchi's arguments are without merit. The Bank's award in *Bank of America* was based on Bianchi's compromise of certain contract claims in the settlement agreement. As stated above, the VECP provision was not included in this compromise. Therefore, just as Bianchi's rights to pursue this award were not foreclosed, neither were the Bank's rights as assignee of the underlying contract.

VI

We conclude that the district court was not precluded from determining that the Bank was entitled, as Bianchi's assignee, to be awarded the amount owed by the Government on the VECP contracts. The claim presented in this matter was not presented to the Federal Circuit in *Bank of America*. This court's decision in *Bianchi v. Perry* is not res judicata regarding the Bank's right to recover on its assignment because the Bank was not a party to the action, nor in privity with the litigants, and the rights of the Bank, under the assignment agreement were not reviewed in that matter.

Bianchi's claim against the Government is based on his express contracts with the Government. The amount in controversy concerning that dispute exceeds $ 10,000. Accordingly, the district court lacked subject matter jurisdiction pursuant to 28 U.S.C. § 1346(a)(2) to determine whether the Government is liable to pay Bianchi $ 58,613.03. Only the Court of Federal Claims can resolve that dispute.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed September 16, 1996]

No. CV-S-94-747-LDG (RJJ)

MAURICE BIANCHI fdba as M. BIANCHI OF CALIFORNIA,
Plaintiff,

v.

CHARLES BOUSHER, Comptroller General of the United States General Accounting Office,
Defendant.

CHARLES BOUSHER, Comptroller General of the United States General Accounting Office,
Counterclaimant,

v.

MAURICE BIANCHI fdba as M. BIANCHI OF CALIFORNIA,
Counterdefendant.

CHARLES BOUSHER, Comptroller)
General of the United States General)
Accounting Office,)
Counterclaimant,)
)
v.)
)
BANK OF AMERICA NATIONAL)
TRUST AN D SAVINGS)
ASSOCIATION,)
Counterdefendant/Claimant in)
Interpleader.)
_____)

ORDER

Entered: September 17, 1996

Plaintiff Maurice Bianchi fdba as M. Bianchi of California (Bianchi) sues Defendant/Counterclaimant Charles Bousher, Comptroller General of the United States General Accounting Office (the Government), seeking to require the Government to pay him $58,613.03, plus interest, that the Armed Services Board of Contract Appeals (the Board) awarded to him. In its answer, the Government brings a counterclaim asserting that it is entitled to set-off certain Small Business Administration (SBA) loans upon which Bianchi defaulted. The Government further interplead Counterdefendant/Claimant in Interpleader Bank of America National Trust and Savings Association (the Bank), asserting that assignments Bianchi made to the Bank require the Government to pay the award to the Bank.

Presently, the following motions and papers are before the court for determination. The Bank moves for summary judgment (#19) against the Government. Bianchi opposes

granting summary judgment in favor of the Bank and against the Government (#23), to which the Bank replied (#27).

Bianchi moves for summary judgment (#20) against the Government. The Bank opposes granting of summary judgment in favor of Bianchi and against the Government (#24), to which Bianchi replied (#35).

Bianchi also cross-moves for summary judgment against the Bank (#23). The Bank opposed (#27), and Bianchi replied (#35).

Finally, the Government filed its response to the above motions (#36), adopting the position of the Bank. In the alternative, the Government asserts that if the Bank is not entitled to the proceeds of the award, then the Government is entitled to offset the award with defaulted SBA loans. Bianchi filed its reply to the Government's response (#39).

Motions for Summary Judgement

In considering motions for summary judgment, the court performs "the threshold inquiry of determining whether there is the need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To succeed on a motion for summary judgment, the moving party must show (1) the lack of a genuine issue of any material fact, and (2) that the court may grant judgment as a matter of law. Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A material fact is one required to prove a basic element of a claim. Anderson, 477 U.S. at 248. The failure to show a fact essential to one element, however, "necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 323.

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 323. As such, when the non-moving party bears the initial burden of proving, at trial, the claim or defense that the motion for summary judgment places in issue, the moving party can meet its initial burden on summary judgment "by 'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325. Conversely, when the burden of proof at trial rests on the party moving for summary judgment, then in moving for summary judgment the party must establish each element of its case.

Once the moving party meets its initial burden on summary judgment, the non-moving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. Pro. 56(e). As summary judgment allows a court "to isolate and dispose of factually unsupported claims or defenses,"

Celotex, 477 U.S. at 323-24, the court construes the evidence before it "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The allegations or denials of a pleading, however, will not defeat a well-founded motion. Fed. R. Civ. Pro. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

The following facts are not disputed and are relevant to disposition of this matter.[1] In 1979 and 1980, the Government awarded Bianchi three contracts to produce clothing for the military, including the contract underlying this suit. Bianchi borrowed money from the Bank to perform these contracts, and assigned the proceeds of these contracts to the Bank as security for the loans. The Bank properly notified the contracting and disbursing officers of these assignments. Subsequently, two of the contracts were terminated for Bianchi's default, and Bianchi defaulted on his loans to the Bank.

Bianchi then began a series of claims, including a Value Engineering Change Proposal (VECP)[2] claim Bianchi had made concerning one of the contracts. In 1988, the parties stipulated and the Board entered this stipulation as a decision, settling Bianchi's claims arising from the contracts.

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[1] A more, complete recitation of facts underlying this suit is set forth in *Bank of America National Trust and Savings Assoc. v. United States*, 23 F.3d 380, 381-382 (Fed. Cir. 1994).

[2] A VECP permits a government contractor to share in the Government's savings caused by a contractor-proposed, and Government-accepted, change to an existing contract specification.

The settlement, however, was without prejudice to Bianchi's right to pursue his VECP claims.[3] Bianchi pursued his VECP claims, and the Board ultimately awarded him $58,613.03. The parties do not dispute that this amount represents proceeds of the underlying government contract. The Government is currently holding this amount, to which both Bianchi and the Bank claim entitlement.

The only issue that the Bank and Bianchi dispute is whether Bianchi's assignment of the proceeds of the contracts was valid. The court now finds that the Bank met its burden of showing that the assignments were valid. Further, as Bianchi failed to meet his burden of offering any evidence to the contrary, summary judgment is appropriate in favor of the Bank.

Initially, the court notes that Bianchi is collaterally estopped from arguing that the assignments were not valid. Under the doctrine of collateral estoppel a party is precluded from re-litigating, in a subsequent action an issue previously adjudicated in a prior action. Collateral estoppel requires that the issue at stake is identical to the one alleged in the prior litigation; that the issue was actually litigated in the prior litigation; and the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Town of North Bonneville v. Callaway,* 10 F.3d 1505, 1508 (9th Cir. 1993). In addition, application of collateral estoppel is appropriate only if legal principles have

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[3] The settlement was also without prejudice to Bianchi's right to pursue an application under the Equal Access to Justice Act to recover legal fees and expenses. The EAJA claim, however, is not at issue in this litigation.

not changed significantly since the prior-litigation and other special circumstances do not warrant an exception to the normal rules of preclusion. *Montana v. United States*, 440 U.S. 147, 155 (1979).

As recited by the United States Court of Federal Claims, Bianchi alleged that his assignments to the Bank were not valid. Exhibit B to Government's Response, p. 3. The court decided this issue adversely to Bianchi, finding that he had failed to offer any facts showing that there was a genuine issue for trial. *Id.* The ruling was not disturbed on appeal. Rather, the Federal Circuit held that the Bank was an assignee under the Assignment of Claims Act, and had not transferred its rights under the original loan when it transferred its rights under the SBA loans to the Government. *Bank of America*, 28 F.3d at 384.

Second, the dispute before the court is whether the Government must pay the VECP award to Bianchi or to the Bank pursuant to the assignment. As such, this court must determine only if the assignments meet the requirements of 41 U.S.C. § 15(b), requiring the Government to pay the proceeds to the Bank. To be valid, an assignment of the proceeds of a government contract must be to a bank, trust company, or other financial institution; the assignment must be for all amounts payable; and written notice of the assignment, together with a true copy of the instrument of assignment, has been provided to the contracting officer, the sureties upon the bonds connected to the contract, and the disbursing officer. If these elements are satisfied, then "[n]otwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section shall constitute a valid assignment for all purposes." 41 U.S.C. § 15(c).

Bianchi has not offered any facts or argument suggesting that his assignments do not meet the requirements of 41 U.S.C. §15(b). Rather, as found by the Federal Circuit, "Bianchi assigned the proceeds and rights associated with each contract to the bank as security for loans to finance Bianchi's performance of the contracts. The bank notified the appropriate contracting and disbursing officers in accordance with the Assignment of Claims Act, 31 U.S.C. § 3727 (1988), 41 U.S.C. § 15 (1988)." As the assignments were valid, summary judgment is appropriate in favor of the Bank and the court need not determine whether the Government is entitled to set-off its SBA claims. The Government must honor the assignment and pay the proceeds of the VECP award to the Bank.

Therefore,

IT IS ORDERED that the Bank's motion for summary judgment (#19) is GRANTED;

IT IS FURTHER ORDERED that Bianchi's motion for summary judgment (#20) is DENIED;

IT IS FURTHER ORDERED that Bianchi's cross-motion for summary judgment (#23) is DENIED.

DATED this 16 day of September, 1996.

/s/_____
Lloyd D. George
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed September 16, 1996]

No. CV-S-94-747-LDG (RJJ)

MAURICE BIANCHI fdba as M. BIANCHI OF CALIFORNIA,
Plaintiff,

v.

CHARLES BOUSHER, Comptroller General of the United States General Accounting Office,
Defendant.

CHARLES BOUSHER, Comptroller General of the United States General Accounting Office,
Counterclaimant,

v.

MAURICE BIANCHI fdba as M. BIANCHI OF CALIFORNIA,
Counterdefendant.

CHARLES BOUSHER, Comptroller)
General of the United States General)
Accounting Office,)
Counterclaimant,)
)
v.)
)
BANK OF AMERICA NATIONAL)
TRUST AN D SAVINGS)
ASSOCIATION,)
Counterdefendant/Claimant in)
Interpleader.)
_____)

JUDGMENT

Entered: September 17, 1996

Pursuant to this Court's Order, JUDGMENT is entered in favor of Counterdefendant/Claimant in Interpleader Bank of America National Trust and Savings Association, and against Plaintiff Maurice Bianchi fdba as M. Bianchi of California (Bianchi) and Defendant/Counterclaimant Charles Bousher, Comptroller General of the United States General Accounting Office. Defendant/Counterclaimant Charles Bousher shall pay to the Bank of America National Trust and Savings Association the amount of $58,613.03, plus interest due from November 17, 1987.

DATED this 16 day of September, 1996.

/s/_____
Lloyd D. George
Chief United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Filed April 9, 1998]

No. 96-15869

MAURICE BIANCHI, fdba M. Bianchi of California, Plaintiff-Appellant,

v.

WILLIAM J. PERRY, Secretary of Defense; UNITED STATES DEPARTMENT OF DEFENSE; E. M. STRAW, Vice Admiral, Director of the Defense Logistics Agency; THE DEFENSE LOGISTICS AGENCY; HENRY R. GLISSON, Brigadier General, Commander of the Defense Personnel Support Center, a Division of the Defense Logistics Agency; THE DEFENSE PERSONNEL SUPPORT CENTER, Defendants-Appellees.

OPINION
Decided April 9, 1998
Argued & Submitted May 7, 1997

Government contractor brought action to collect fees and expenses he was awarded under Equal Access to Justice Act (EAJA) in accordance with settlement agreement with government. The United States District court for the District of Nevada, Howard D. McKibben, J., granted summary judgment for government. Contractor appealed. The Court of Appeals, Kleinfeld, Circuit Judge, held that: (1) lack of parallelism in paragraphs in settlement agreement did not establish parties' intent that contractor would take settlement amount free from setoff, but not EAJA award, and (2) prior appellate decision that government lacked setoff right as to settlement amount and interest had res judicata effect as to government's setoff rights against contractor's EAJA award.

Reversed.

1. Compromise and Settlement 11

Lack of parallelism in paragraphs in settlement agreement between government and contractor regarding amounts to which contractor was entitled, amounts he could pursue under value engineering change proposal claims, and attorney fees and costs he could pursue under Equal Access to Justice Act (EAJA) did not establish parties' intent that contractor would take settlement amount free from setoff, but not EAJA award; in context of agreement, contractor's right to "pursue" award meant government would pay award once it was established. 28 U.S.C.A. § 2412.

2. Judgment 720

Prior appellate decision that government lacked right to setoff against settlement and interest owed to contractor under settlement agreement, based on contractor's assignment to his bank and bank's assignment to Small Business Administration (SBA), has res judicata effect as to government's setoff rights with respect to attorney fees awarded to contractor pursuant to Equal Access to Justice Act (EAJA), which contractor retained right to pursue under settlement agreement. 28 U.S.C.A. § 2412; Restatement of Restitution § 12.

George E. Graziadei (On the Briefs); and Scott Michael Cantor (Argued), Graziadei & Cantor, Ltd., Las Vegas, NV, Gerson B. Kramer (Argued), Chevy Chase, MD, for plaintiff-appellant.

Mark A. Melnick, Commercial Litigation Branch, Department of Justice, Washington, D.C., for the defendants-appellees.

Appeal from the United States District Court for the District of Nevada. Howard D. McKibben, District Judge, Presiding. No. CV-94-00686-HDM.

Before: PREGERSON, NOONAN and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

This is a res judicata case regarding settlement of a government contract dispute.

Facts

The government hired Bianchi to sew garments for the military. In 1979 and 1980, it contracted for Bianchi to make about 43,000 raincoats for the Navy, 27,000 women's jackets for the Air Force, and 125,000 men's coats. Bianchi borrowed money from Bank of America secured in part by an assignment of contract proceeds. The bank loan was guaranteed by the Small Business Administration. The bank went through the proper steps to obtain government approval of the assignments and to make them binding upon the government.

Claims arose in all directions. Bianchi and the bank had a dispute in state court over whether the bank properly performed its duties under the loan agreement. Bianchi and the United States had a dispute in the Armed Services Board of Contract Appeals over whether the government owed him more money. Eventually the bank and the government had a dispute as well.

Bianchi's claim against the military was settled by stipulation. The stipulation, made in September 1988, provided that Bianchi would recover $ 617,500 plus interest, the government would recover nothing on its claims, and Bianchi reserved his rights to pursue "value engineering change proposal claims," and to pursue his Equal Access to Justice Act claim for legal fees and expenses related to his claims.[1] The Armed Services Board of Contract Appeals then

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[1] Here is the stipulation in full:

The parties to the above-listed appeals agree to stipulate to the following decision by the Board:

issued a decision accepting the stipulation, and saying "the appeals are sustained" and "in the nature of a consent

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"1. The parties agree that Mr. Maurice Bianchi, as the successor to M. Bianchi of California, is entitled to recover $ 617,500.00 on his claims in the following appeals: ASBCA Nos. 26362, 26363, 26364, 26365, 26505, 26506, 26513, 26642, 29932, 29933 and 29934; that the government is entitled to take nothing on its claims in the following appeals: ASBCA Nos. 26362, 26363, 26364, 26365, 26366, 26505, 26506, 26513, 26642, 29932, 29933 and 29934; and that Mr. Bianchi is entitled to interest computed in accordance with Clauses L78 (Disputes (1979 MAR)) of the contracts, at the rates prescribed by the Secretary of the Treasury, under the Renegotiation Act, Public Law 92-41, on the principal amount of $ 617,500, such interest to run from June 19, 1981 until the date of payment; and that the parties waive their rights to seek reconsideration of this stipulated decision of the Board or to appeal that stipulated decision;

"2. This settlement is without prejudice to Mr. Bianchi's right to pursue any and all Value Engineering Change Proposal Claims under his contracts with DPSC; and

"3. This settlement is without prejudice to Mr. Bianchi's right to pursue an application under the Equal Access to Justice Act to recover whatever legal fees and litigation expenses to which he may be entitled in connection with these claims and appeals. The parties stipulate that the issues of prevailing party and substantial justification will be decided on the basis of the record made at the first trial. The parties agree that the application for legal fees and litigation expenses under the Equal Access to Justice Act will be submitted within thirty days of receipt by Appellant of the agreed-upon settlement program."

Except as noted above, Appellant and the government agree to stipulate to the dismissal of these appeals with prejudice.

judgment, the Board makes a monetary award in the amount of $ 617,500.00 with interest from 18 June 1981." With more than seven years of interest, the government's obligation under this judgment was $ 1,141,220.83. The government paid Bianchi that amount of money.

Two years later, in 1990, Bank of America filed a complaint in the United States Claims Court against the government. The bank's complaint said that Bianchi owed the bank more than $ 1.1 million, so the government should have paid the money to the bank, not to Bianchi. The government's answer in the Claims Court claimed a right to setoff. The government claimed that because the Small Business Administration had already paid the bank on its 90% guarantee of Bianchi's loan, and Bianchi owed the SBA more than the amount he had been paid, the government was entitled to setoff whatever Bianchi owed the SBA against what the government owed the bank.

The government filed a third-party complaint against Bianchi in the Claims Court proceeding. In that complaint, the government said that it paid Bianchi his $ 1.1 million settlement in error, because he owed the Small Business Administration more than that. The complaint says "the SBA was entitled to the entire $ 1,141,220.83. Consequently that money was erroneously paid to Mr. Bianchi. Neither he nor the bank was entitled to it. ... The government is entitled to the repayment of the $1,141,220.83 erroneously paid by it to Mr. Bianchi."

The bank initially lost in the Claims Court. The court held that the government may recover funds erroneously paid, under *American National Bank and Trust v. United States,* 23

Cl.Ct. 542, 547 (1991) and *United States v. Wurts,* 303 U.S. 414, 415, 58 S.Ct. 637, 638, 82 L.Ed. 932 (1938). Because the government had paid Bianchi in error, Bianchi had to return the money. The bank was entitled to nothing on its assignment, because the SBA had already paid the guarantee, and the bank had assigned the notes to the SBA. The Claims Court ruled that the government's erroneous payment to Bianchi had resulted from its own negligence, and it had not requested its money back until October of 1990, so interest was denied.

Bianchi appealed, and won. In a published decision, *Bank of America National Trust & Savings Association v. United States,* 23 F.3d 380 (Fed. Cir. 1994), Bianchi won a determination that the government was not entitled to assert its claim against Bianchi at all. *Id.* at 384. The reason was that the government had settled on paying him $ 617,500 plus interest. The Federal Circuit said there is a strong policy of upholding and enforcing settlement agreements, and "the government's right to recoup erroneously paid funds cannot be invoked by the government as a means to circumvent a legal obligation." *Id.* at 383. The settlement was made at arms' length, there was no claim that Bianchi withheld material information, the government knew of the assignments to the bank and the bank's assignments to the SBA. The Federal Circuit noted that there was no evidence of any fraud, misdirection or concealment by Bianchi. "In the absence of any fraud, misdirection, or concealment, the government may not recover funds paid in good faith and to the satisfaction of the interested parties." *Id.*

The Federal Circuit pointed out that the government could easily have protected itself against liability to the bank,

and perhaps did not because Bianchi would not have agreed to a settlement in which he would not receive the $ 617,500 plus interest. "Whatever the reason for its failure to protect itself, the government cannot now renege on its commitment to honor its settlement with Bianchi, into which it entered into voluntarily and with full knowledge of the facts." *Id.* The Federal Circuit considered whether the government could recover from its putatively mistaken payment by the indirect means of a third-party complaint on the bank's claim, even though the settlement had been incorporated in a final judgment, and decided that "the government should not be allowed to do indirectly what it is prohibited from doing directly." *Id.* at 384.

The bank prevailed against the government as well, based on the seniority of its claim. The Federal Circuit held that "the government's payment to Bianchi in settlement of the contract dispute was a payment under the contract that should have gone to the bank under the assignment." *Id.* at 384. The SBA contract had limited setoff rights, so that government rights against Bianchi could not be set off against the bank. *Id.* at 385.

Meanwhile, before the bank ever sued the government, Bianchi had litigated his claim for Equal Access to Justice attorney's fees and expenses before the Armed Services Board of Contract Appeals. After an opinion in 1989, and a remand for negotiation, the Board decided in a second opinion September 25, 1990, that Bianchi was entitled to $ 475,724.51 for legal fees and expenses. But the government did not send Bianchi the money.

Eventually, after complying with all of the demand

procedures required by statutes and regulations, Bianchi filed an action in the United States District Court for the District of Nevada, to collect the $ 475,724.51 EAJA fees and expenses he had won in the Armed Services Board of Contract Appeals. This was money he had spent in the early '80s to make the government pay him for the raincoats and jackets. The district court granted summary judgment against Bianchi on this claim. Bianchi's appeal of this summary judgment is what we have before us now.

The district court decided that Bianchi's EAJA claim was sufficiently distinct from the claim ruled upon by the Federal Circuit, so it should be treated differently for purposes of setoff. The district court concluded that the government could use its claim for mistaken payment as a setoff against what it owed Bianchi on his successful $ 475,000 Equal Access to Justice Act award.

Analysis

The hard questions in this case relate to setoff. When the government makes a mistaken agreement to settle a claim (if indeed the agreement or payment was mistaken), should it be allowed to recover the money by setting it off against that claim or another? We do not have to answer that question. The Federal Circuit did. Even if the settlement was negligently made, even though it was with the government, a deal is a deal. Though other questions are raised, this case finally turns on whether the Federal Circuit decision is res judicata on setoff against another part of the same deal. It is.

I. Parole Evidence.

The settlement with Bianchi, for $ 617,500 in new money, may not have been erroneous at all. Bianchi submitted affidavits in opposition to summary judgment which tended to show that he and his lawyer had raised and discussed the SBA claims when they negotiated the $ 617,500 settlement. The affidavits indicated that the settlement was cut from $ 635,000 dollars to $ 617,500, in order to include a nominal amount satisfactory to the government to settle the SBA claims against Bianchi. In addition, the government had offered a $ 100,000 larger settlement that would include the Equal Access to Justice claim, or else had offered the lesser amount reserving Bianchi's right to pursue his Equal Access to Justice Act claim. Bianchi thought he would get more than $ 100,000, so he had turned down the $ 735,000 dollar offer to include EAJA fees and expenses. His $ 475,000 EAJA award shows he was right.

The district court held that this evidence should not be considered, under the parole evidence rule. Bianchi argues on appeal that it should be considered, because his affidavit and other materials show that the settlement stipulation was not a fully integrated agreement. Under Bianchi's theory, as evidenced by the affidavit and contemporaneous correspondence, the government's payment to him was not a mistake at all. The purpose was to pay him personally enough money to induce him to settle, and to pay that money without a silent setoff of what he owed the SBA on his defaulted and assigned bank loans.

We conclude that we do not have to decide whether the district court erred in excluding these materials under the parole evidence rule. Because the res judicata consequences of the Federal Circuit decision, combined with a fair reading

of the stipulation and judgment before the Armed Services Board of Contract Appeals, are conclusive of the effect of the settlement agreement in favor of Bianchi, we need not decide whether the parole evidence should have been considered.

II. The Settlement Agreement.

[1] The stipulation the parties made is typical of the forms used to settle disputed claims in both directions, with specified rights reserved to allow one side to pursue additional amounts. The form is that (1) Bianchi "is entitled to recover" $ 617,500 plus interest, (2) "the government is entitled to take nothing on its claims," (3) the settlement is "without prejudice to" Bianchi's right to pursue "Value Engineering Change Proposal claims," and (4) the settlement is "without prejudiced to" Bianchi's right to pursue an EAJA application to recover whatever fees and expenses he may be entitled to. Enormous numbers of claims are settled with similar forms every week, with the government and in innumerable private lawsuits about torts and contracts. We share the Federal Circuit's concern that "there is a compelling public interest and policy in upholding and enforcing settlement agreements voluntarily entered into." *Bank of America,* 23 F.3d at 383.

Any honest and competent lawyer would understand this settlement agreement in the same way. It means Bianchi gets $ 617,500 plus interest, plus whatever he can win on his "Value Engineering Change Proposal claims," plus whatever he can win on his Equal Access to Justice Act claim. Attorney's fees claims often are broken out of a settlement, as in this one, because the parties cannot agree on what determinations a court will make on prevailing party, substantial justification, and amount, *see* 5 U.S.C. § 504, and

each is willing to bear the risk of a less favorable determination than it expects.

For a lawyer to enter into such a settlement agreement, with the unstated intention that his client should not pay the money agreed to, would be sharp practice. The government argues from lack of parallelism in the phrasing of the different paragraphs of the settlement agreement that Bianchi is only entitled to the $ 617,500 without setoff, not the EAJA award. The settlement agreement said Bianchi "is entitled to recover" the $ 617,500, but only that it is "without prejudice to" his "right to pursue" his Equal Access to Justice Act claim "to recover" attorneys' fees and expenses, so it did not agree to pay the EAJA award. The government's theory is that it promised Bianchi could "recover" the $ 617,500, but not the EAJA award, which it only left Mr. Bianchi free to "pursue."

We reject the distinction. It is apparent from a reading of the stipulation in its entirety that the parties did not mean that the government would only pay the $ 617,500, but dispute payment of what Mr. Bianchi was found to be entitled to as an EAJA award. Had the government meant that, the agreement would have said so. The agreement says Bianchi is entitled "to recover" the $ 617,500 principal, and that he is "entitled to" interest, yet even though the agreement did not use the phrase "to recover" regarding Mr. Bianchi's entitlement to interest, neither side understood absence of the phrase to imply that he could not "recover" the interest without a setoff. The agreement does use the phrase "to recover" in the EAJA provision, "right to pursue an application ... to recover." The phrase "to recover" is not in the Value Engineering Change proposal Claims paragraph, "right to pursue." Not a single one of the provisions is written

in parallel phrasing with any other. The only plausible reading we can see for the slight differences in phrasing are lack of careful editing for parallelism, not an expressed mutual intention that even if Bianchi won an EAJA award, it would not be paid without a fight. In the context of this dispute, the word "pursue" meant that Bianchi had to win an EAJA award, but once the award was established, the government would pay it. In private actions where there is a right to attorneys' fees, lawyers frequently agree to settle for a principal amount and to allow one side to pursue an attorneys' fees award, meaning that they will pay it once entitlement to attorneys' fees and amount are determined. Were an insurance defense lawyer to enter into such a settlement agreement on behalf of an insurance company, and then claim that they only promised to allow pursuit of the money, not to pay it, the best the lawyer and insurer could hope for would be long-term distrust, and more likely they could expect bad faith litigation. Giving the settlement agreement so strained construction would encourage sharp practice. Thus we conclude that there is no difference in whether the government agreed to pay the $ 617,500 and whether it agreed to pay the EAJA award, once Mr. Bianchi had won a liquidated amount. The setoff issue is the same as to both. To the extent that the government had a claim against Bianchi for his unpaid SBA loans, the settlement agreement no more allowed the government to lie in the weeds with a setoff against the EAJA award than with the $ 617,500.

III. The Federal Circuit Decision.

[2] Although the Federal Circuit decision dealt only with the $ 617,500, not the EAJA award, the reason for the Federal Circuit result does not allow for a distinction between

the one and the other. With respect to the EAJA attorney's fees, as with the principal and interest, the government acted with its eyes open. It had full knowledge of the assignment of Bianchi's right to payment to his bank, and of the bank's assignment to the SBA. The Federal Circuit decision establishes that there was no fraud, and the government made a commitment to pay Bianchi the money despite its potential entitlements against him. If the government mistakenly overlooked its rights (and it may not have), then its own negligent error does not entitle it to renege on its commitment. *See Restatement of Restitution* § 12 (unilateral mistake not grounds for restitution). Allowing the government to renege on its commitment because it negligently agreed to pay Bianchi more than it should have agreed to pay him "would seriously decrease the willingness of parties to settle litigation on mutually agreeable terms and thus weaken the efficacy of settlements generally." *Bank of America,* 23 F.3d at 384. Using the setoff against the attorney's fees would have exactly the same effect as allowing its use against the $ 617,500 or the interest, and "the government should not be allowed to do indirectly what it is prohibited from doing directly." *See id.*

Because its ratio decidendi does not allow for a distinction, we conclude that the Federal Circuit decision is res judicata. That decision established that the government was not entitled to a setoff against the $ 617,500 or the interest based on Bianchi's assignment to his bank and the bank's assignment to the SBA. The reasoning of the decision establishes that the assignments could not entitle the government to a setoff against the settlement at all. The meaning of that agreement, with respect to setoff, has already been conclusively determined by the Federal Circuit. *See Robi*

v. Five Platters, Inc., 838 F.2d 318, 321-22 (9th Cir. 1988).

Conclusion

Although Bianchi's parole evidence suggests that the government intentionally relinquished whatever right it had to collect the SBA loan from the proceeds of Bianchi's award, we have assumed the contrary, because we are not deciding the parole evidence issue. Thus, we assume that the government negligently omitted to provide in the settlement agreement that it would set off its SBA entitlement against Bianchi's contract entitlement. Even so, it is nevertheless res judicata under the Federal Circuit decision that the government walked away from the money. We will not impose a strained reading on the settlement agreement that would enable the government to recover from its own negligence by sharp practice.

REVERSED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

[Filed April 29, 1994]

Nos. 93-5059, 93-5060

BANK OF AMERICA NATIONAL TRUST and SAVINGS ASSOCIATION, Plaintiff/Cross-Appellant,	)
v.	)
THE UNITED STATES, Defendant/Third Party Plaintiff-Appellee,	)
v.	)
MAURICE L. BIANCHI, Third Party Defendant-Appellant.	)

April 29, 1994
Rehearing Denied June 23, 1994

Bank of America filed complaint against government seeking payment of over $1 million as defense contractor's

assignee under Assignment of Claims Act. The government asserted as an affirmative defense Small Business Administration's (SBA) superior right to money paid to government contractor under settlement agreement. Subsequently government filed third-party complaint against contractor seeking return of money paid under settlement. The Court of Federal Claims, Hodges, J., granted summary judgment in favor of government against contractor. The Court of Appeals for the Federal Circuit held that: (1) where government had waived right to challenge settlement as part of settlement agreement, government was precluded from seeking to recover settlement award through third-party complaint; (2) bank retained right to receive payments under contracts after it assigned its interest in guaranty loans to SBA for payment on loan guarantees; and (3) Act limited government's rights to set off government contractor's debts against payment to bank as contractor's liability on promissory notes did not arise from defense contracts.

Reversed in part, vacated in part.

Mayer, Circuit Judge, filed opinion concurring in part and concurring in judgment.

1. United States 88

Government's right to recoup erroneously paid funds cannot be invoked by government as means to circumvent legal obligation.

2. United States 88

Where government agreed to settle contractor's claims

and voluntarily relinquished its right to disturb settlement in return for contractor's agreement to discontinue action against government, government could not invoke right to recoup erroneously paid funds to circumvent government's obligation under settlement, particularly absent any indication that parties failed to deal with each other at arm's length or that contractor withheld material information and where government had adequate knowledge of various financial arrangements associated with contract.

3. United States 88

Absent any fraud, misdirection or concealment, government could not recover funds paid in good faith and to satisfaction of interested parties.

4. United States 88

Where government had waived its right to challenge settlement, government was precluded from seeking to recover settlement award through third-party complaint filed in Court of Federal Claims.

5. United States 111(12)

Where Bank of America obtained security interest in contract receivables through assignment in return for original loans to finance contract performance and was granted security interest in receivables again when Bank later extended guaranteed loan, and second interest was eventually transferred by Bank to Small Business Administration (SBA) in return for payment on loan guarantees, SBA took its interest subject to preexisting interest retained by Bank; rights

under guaranteed loans attached after interest on earlier loan secured by same collateral, and record showed that SBA clear knew of Bank's senior interest in contract payments. 31 U.S.C.A. § 3727; 41 U.S.C.A. § 15.

6. United States 111(12)

As assignee under Assignment of Claims Act, Bank of America's security interest in contractor's contract receivables included right to bring suit against government to recover any contract payment made to another. 31 U.S.C.A. § 3727; 41 U.S.C.A. § 15.

7. United States 111(12)

As assignee under Assignment of Claims Act, Bank of America's security interest in government contractor's contract receivables included right to bring suit against government to recover any contract payment made to another, which Bank had not relinquished in transfer of portion of security interest to Small Business Administration (SBA) in return for payment on loan guaranty, and thus Bank had right to payment under Act; government's payment to contractor/assignor in settlement of contract dispute was payment under contract that should have gone to Bank under assignment. 31 U.S.C.A. § 3727; 41 U.S.C.A. § 15.

8. United States 130(3)

Like any creditor, government has right to set off contractor's debts against payment due the contractor. 41 U.S.C.A. § 15.

9. United States 111(12)

Assignment of Claims Act expressly limited government's rights to set off contractor's debts against payment to assignee; under Act, government contracts could provide that assignee's right to contract payments would not be subject to reduction or setoff for any liability of assignor to United States, or any department or agency thereof, which arose independently of contract. 31 U.S.C.A. § 3727; 41 U.S.C.A. § 15.

10. United States 111(1)

Goal of Assignment of Claims Act is to make it easier for contractors to finance performance of their obligations to the government. 31 U.S.C.A. § 3727; 41 U.S.C.A. § 15.

11. United States 111(12)

Government contractor's liability to Small Business Administration (SBA) on promissory note was independent of defense contracts and therefore contractor's assignee was entitled to recover amount due under government's settlement with contractor, although notes were intended to finance performance of contracts, and security agreements expressly listed rights to contract payments as collateral, liability on notes did not arise from defense contracts but was imposed by loan documents, and government had conceded any defense to payment based on inadequate performance of contracts by settling contractor's contract claims. 31 U.S.C.A. § 3727; 41 U.S.C.A. § 15.

Michael L. Burack, Wilmer, Cutler & Pickering, of Washington, D.C., argued for plaintiff/cross-appellant. With him on the brief were Eric R. Markus and Lydia R. Pulley.

Mark A. Melnick, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant/third party plaintiff-appellee. With him on the brief were Stuart E. Schiffer, Acting Assistant Attorney General and David M. Cohen, Director. Also on the brief were Sandra Guydon, Office of the Philadelphia, Pennsylvania and Joel K. Meese, Small Business Administration, of counsel.

Michael A. Hordell, Petrillo & Hordell, of Washington, D.C., argued for Third Party Defendant-Appellant. With him on the brief was Eric L. Lipman, of counsel. Mr. Hordell and the law firm of Petrillo & Hordell, withdrew as counsel of record with the courts permission before the matter was decided.

Before RICH, MAYER, and LOURIE, Circuit Judges.

PER CURIAM

Maurice L. Bianchi appeals the judgment of the United States Court of Federal Claims,[1] No. 90-3961C, entered pursuant to the grant of summary judgment in favor of the United States, and the denial of his cross-motion for summary

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[1] The United States Claims Court was renamed the United States Court of Federal Claims on October 29, 1992. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516.

judgment. Bank of America likewise appeals the court's grant of summary judgment in favor of the United States against it, and the denial of its motion for summary judgment. We reverse in part and vacate in part.

Background

The following facts are not disputed. In June 1979, Bianchi executed a security agreement in favor of Bank of America (bank), granting it a security interest in his property, including after-acquired accounts and contract rights. This interest secured Bianchi's existing obligations to the bank, as well as future loans and advances by the bank to Bianchi.

During 1979 and 1980, the Defense Logistics Agency (DLA) awarded three contracts for military clothing (numbers DLA100-79-C2894, DLA100-80-C2290, and DLA100-80-C2972) to M. Bianchi of California, a sole proprietorship of Maurice Bianchi. Shortly after the award of each contract, Bianchi assigned the proceeds and rights associated with each contract to the bank as security for loans to finance Bianchi's performance of the contracts. The bank notified the appropriate contracting and disbursing officers in accordance with the Assignment of Claims Act, 31 U.S.C. § 3727 (1988), 41 U.S.C. § 15 (1988); the government acknowledged and accepted each assignment. Thereafter, the bank received payments from the government of sums due Bianchi under the contracts.

Later in 1980, Bianchi and the bank sought to restructure their relationship, applying to the Small Business Administration (SBA) for a 90 percent guarantee on an additional $ 500,000 loan to Bianchi. The application

disclosed the bank's preexisting lien position. The SBA approved the application, and the bank issued the loan; the collateral included a third lien on all receivables, including contract rights. Bianchi executed another security agreement, again granting the bank a security interest in all rights to payment of money owned or thereafter acquired by him. In July of 1981, the bank made another 90 percent SBA guaranteed loan to Bianchi of $ 50,000. The new loan was covered by the future advances clause of the December 1980 agreement.

Soon thereafter, DLA terminated two of the contracts for default. Bianchi defaulted on the loans, including both the SBA guaranteed loans and the bank's prior non-guaranteed loans. In December 1981, the bank applied to the SBA for payment on the guarantees, in return for which it assigned its interest in the guaranteed loans to the SBA.

In 1981, Bianchi instituted a series of claims under the contracts before the Armed Services Board of Contract Appeals (board). In September 1988, DLA and Bianchi agreed to settle the claims. Under the settlement agreement, DLA agreed to pay $617,500 plus interest directly to Bianchi. The government paid Bianchi a total of $1,141,220.83.

In June 1990, the bank requested that the government pay it the settlement amount under the Assignment of Claims Act. On October 23, 1990, DLA wrote to Bianchi, demanding repayment of the money, acknowledging that payment should have gone to the bank under the assignment. Bianchi made no repayment, and the government took no further action until the bank filed this suit.

On November 21, 1990, the bank filed its complaint against the government in the United States Court of Federal Claims seeking payment of the $ 1,141,220.83 as assignee under the Assignment of Claims Act. The government asserted as an affirmative defense the SBA's superior right to the money paid to Bianchi. On April 16, 1992, the government filed a third-party complaint against Bianchi seeking return of the money paid under the settlement.

All parties moved for summary judgment. The court granted summary judgment in favor of the government against the bank, holding that the bank had assigned its rights to the SBA and had no further claim on money due Bianchi under the contracts. The court also granted summary judgment in favor of the government against Bianchi in the amount of $1,141,220.83, concluding that the government had erroneously paid Bianchi and was therefore entitled to repayment.

Discussion

I.

Bianchi raises constitutional and procedural objections to the judgment against him in the Court of Federal Claims. We decline to reach Bianchi's constitutional arguments because we conclude that the government was not entitled to assert its claims against Bianchi in the first instance.[2]

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[2] Although the concurrence would resolve this case on constitutional grounds, we adhere to the doctrine that we should avoid deciding constitutional questions where an alternative basis exists upon which our decision may rest. *See Hagans v. Lavine*, 415

The funds the government seeks to recover through its third-party complaint stem from an agreement reached between the government and Bianchi in 1988 settling a contractual dispute. Pursuant to the agreement, the government agreed to pay Bianchi $ 617,500 plus interest in satisfaction of Bianchi's claims. This agreement was incorporated into a decision of the Armed Services Board of Contract Appeals, in which it was stipulated that the parties waived their rights to appeal or seek reconsideration of the board's decision.

In support of its claim against Bianchi, the government now contends that the settlement award was paid to Bianchi in contravention of the various assignments of rights associated with Bianchi's contracts and that it has a right to recover any funds erroneously paid from the public treasury. The government does not have that right in this case.

[1, 2] The government's right to recoup erroneously paid funds cannot be invoked by the government as a means to circumvent a legal obligation. In return for Bianchi's agreement to discontinue his action against the government, the government agreed to settle his claims and voluntarily relinquished its right to disturb the settlement. Bianchi accordingly ceased pursuing his contract claims and the government must likewise be held to its end of the bargain. "The law strongly favors settlement of litigation, and there is

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U.S. 528, 565, 94 S. Ct. 1372, 1393, 39 L.Ed. 2d 577 (1974) (Rehnquist, J., dissenting); *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1126, (Fed. Cir. 1985) (Markey, C.J., additional views).

a compelling public interest and policy in upholding and enforcing settlement agreements voluntarily entered into." *Hemstreet v. Spiegel, Inc.*, 851 F.2d 348, 350, (Fed. Cir. 1988) (citing *Bergh v. Department of Transp.*, 794 F.2d 1575, 1577 (Fed. Cir.), *cert. denied*, 479 U.S. 950, 107 S.Ct. 437, 93 L.Ed.2d 386 (1986)).

[3] The government does not challenge the validity or the enforceability of the settlement. Indeed, there is no indication that the parties failed to deal with each other at arm's length or that Bianchi withheld material information. The government certainly had adequate knowledge of the various financial arrangements associated with the contracts in view of the fact that the assignments from Bianchi to the bank were made pursuant to the Assignment of Claims Act, which was designed to protect the government from secret assignments. *See McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369, 65 S. Ct. 405, 89 L. Ed. 305 (1945); *Pittman v. United States*, 116 F. Supp. 576, 580 (1953), *cert. denied*, 348 U.S. 815, 75 S. Ct. 23, 99 L. Ed. 642 (1954). In the absence of any fraud, misdirection, or concealment, the government may not recover funds paid in good faith and to the satisfaction of the interested parties. *See McKnight v. United States*, 13 Ct. Cl. 292, 313, 1800 WL 946 (1877), *aff'd*, 98 U.S. 179, 25 L. Ed. 115 (1878). Here, "[t]here was nothing contrary to good morals or conscience in the payment or receipt of the money. The facts were all known." 98 U.S. at 185-86.

[4] The government could easily have taken appropriate steps to avoid incurring any liability to the bank. For example, the government could have insisted that any settlement award be paid to the bank in view of the bank's

asserted security interest. The government did not do so, perhaps because Bianchi would not have agreed to that arrangement or because the government presumed that the bank retained an inferior interest. Whatever the reason for its failure to protect itself, the government cannot now renege on its commitment to honor its settlement with Bianchi, into which it entered voluntarily and with full knowledge of the facts. "To permit [the government] to escape its obligation under the settlement would seriously decrease the willingness of parties to settle litigation on mutually agreeable terms and thus weaken the efficacy of settlements generally." *Hemstreet,* 851 F.2d at 350.

Although the government waived its right to challenge the board's decision awarding payment to Bianchi, it attempts to do just that by means of a third-party complaint filed in another forum. The government should not be allowed to do indirectly what it is prohibited from doing directly. We therefore hold that the government, having waived its right to challenge the settlement, is precluded from seeking to recover the settlement award through a third-party complaint filed in the Court of Federal Claims.

II.

In its cross-appeal, Bank of America challenges the trial court's conclusion that the bank retained no right to receive payments under the Bianchi contracts after it assigned its interest in the guaranteed loans to the SBA in return for payment on the loan guarantees. Specifically, the bank argues that it is entitled to judgment because of its superior right to contract payments as Bianchi's assignee under the Assignment of Claims Act.

[5] Both the bank and the SBA claim a security interest in Bianchi's contract receivables. The bank obtained its interest, the assignment, in return for its original loans to finance Bianchi's contract performance. When it later extended the guaranteed loans, Bianchi again granted it a security interest in the receivables, an interest the bank eventually transferred to the SBA in return for payment on the loan guarantees. The Court of Federal Claims agreed with the government that this transfer assigned all of the bank's interest in the contract payments, not merely those associated with the guaranteed loans.

The loan documents refute this position, for they show that the bank assigned away only its rights "in those certain Note[s]" relating to the guaranteed loans. Since the rights under the guaranteed loans attached after the interest under the earlier loans secured by the same collateral, the SBA took its interest subject to the preexisting interest retained by the bank. *Cf. United States v. McDermott,* ___ U.S. __, __, 113 S. Ct. 1526, 1531, 123 L.Ed.2d 128, (1993) ("When two private lenders both exact from the same debtor security agreements with after-acquired property clauses, the second lender knows ... that that category of property will be subject to another claim"). Indeed, the record shows that the SBA clearly knew of the bank's senior interest in the contract payments.

[6,7] As an assignee under the Assignment of Claims Act, the bank's security interest included the right to bring a suit against the government to recover any contract payment made to another. *Produce Factors Corp. v. United States,* 467 F.2d 1343, 1349 (Ct.Cl. 1972). As we said, the bank never relinquished this right. "The Government having

received timely notice of plaintiff's assignment paid [Bianchi] at its peril. And where an erroneous payment is made by the Government it is no bar to the rightful claimant." *Central Nat'l Bank v. United States,* 91 F.Supp. 738, 741 (Ct.Cl. 1950) (citation omitted). The government's payment to Bianchi in settlement of the contract dispute was a payment under the contract that should have gone to the bank under the assignment. Thus, the bank has a right to the payment under the Act.

[8] The government asserts a right to set off the amount that Bianchi owed to the SBA against any money owed to the bank by virtue of the settlement. Of course, like any creditor, the government has the right to set off a contractor's debts against payments due the contractor. *United States v. Munsey Trust Co.,* 332 U.S. 234, 239, 67 S.Ct.1599, 1601-02, 91 L.Ed. 2022 (1947). The government argues that as an assignee, the bank had no greater claim to the payment than did Bianchi, its assignor. If true, the government could set off Bianchi's liability to the SBA against money due the bank. *Cf. id.* at 239-40, 67 S.Ct. at 1601-02 ("Insofar as the suitor in the Court of Claims asserted the contractor's title to the sum in dispute, that court was under statutory duty to recognize the undisputed claim for damages of the United States").

[9] But the bank is not simply an ordinary assignee. The Assignment of Claims Act expressly limits the government's right to set off Bianchi's debts against payments to the bank. 31 U.S.C. § 3727; 41 U.S.C. § 15. Under the Act, government contracts may provide that an assignee's right to contract payments "shall not be subject to reduction or set-off for any liability of any nature of the assignor to the

United States or any department or agency thereof which arises independently of such contract ...." 41 U.S.C. § 15. Bianchi's contracts contained such a clause.

[10] The goal of the Assignment of Claims Act is to make it easier for contractors to finance performance of their obligations to the government. *Produce Factors Corp. v. United States,* 467 F.2d at 1348. The inclusion of "no set-off" clauses alleviates some of the uncertainty that would otherwise hinder financing by ensuring assignees a stream of payments unaffected by the contractor's potentially numerous "obligations to the United States not imposed by the contract from which the payments flowed." *Central Bank v. United States,* 345 U.S. 639, 643, 73 S. Ct. 917, 97 L.Ed. 1312, (1953). *See Produce Factors,* 467 F.2d at 1348 (assignee's right to receive payment of contract proceeds dependent only on "performance by the contractor of his contractual obligations").

[11] While the government could assert against the bank any defenses arising against Bianchi under the contracts, *Produce Factors Corp.,* 467 F.2d at 1349 (non-performance or failure of consideration), Bianchi's indebtedness to the government arose not from the contracts, but from the notes. The government argues that the notes are not independent of the contracts, for they were intended to finance the performance of the contracts, and, indeed, the security agreements expressly listed rights to contract payments as collateral. Even accepting that Bianchi's liability on the notes was "related to" the contracts, however, we agree with the bank that the liability on the notes arose "independently of such contract."

The Supreme Court addressed this language in *Central Bank v. United States,* 345 U.S. at 646, 73 S.Ct. at 920, ruling that the United States could not set off a contractor's tax indebtedness against sums due an assignee on the contract. The tax liability arose from the contractor's failure to pay withholding and unemployment taxes for work done on the contract. The Court reasoned, however, that the government could not set off the tax because it did not arise from the contract; the tax was imposed by statute, and would have been due even absent a contract with the government. *Id.* at 645-46.

Like a contractor's tax liability, Bianchi's liability on the notes did not arise from his defense contracts, it was imposed by the loan documents. He could owe on the notes even if he had no contract. Moreover, the government has conceded any defense to payment based on inadequate performance of the contracts by settling Bianchi's contract claims. Because his liability on the notes "lay neither in execution nor in breach of the contract[s]," *Central Bank,* 345 U.S. at 646, 73 S.Ct. at 920, Bianchi's liability to the SBA on the notes is independent of the contracts, barring set-off by the government. Therefore, the bank should recover the amount due under the government's settlement with Bianchi.

Conclusion

Accordingly, we reverse the judgment of the Court of Federal Claims in the government's favor against the bank, and vacate the judgment in favor of the government against Bianchi.

COSTS

The bank and Bianchi shall have their costs.

REVERSE IN PART, VACATE IN PART

MAYER, Circuit Judge, concurring in part and concurring in the judgment.

I join the court's opinion insofar as it explains why the bank prevails. I also agree that the government's claims against Bianchi should have been dismissed, but write separately because I do not believe the Court of Federal Claims had jurisdiction to reach the merits of those claims. I share the reluctance to reach constitutional questions, but the court impermissibly assumed there is jurisdiction where there is none.

The Court of Federal Claims based its jurisdiction over Bianchi on 41 U.S.C. § 114(b) (Supp. IV 1992), which says that court may "summon any and all persons with legal capacity to be sued to appear as a party or parties in any suit or proceeding of any nature whatsoever pending in said court to assert and defend their interests ...." More specifically, section 114(b) authorizes the Court of Federal Claims to hear the government's "claims and contingent claims for the recovery of money hereafter paid by the United States in respect of the transaction or matter which constitutes the subject matter" of the pending suit. *Id.*

This court has said that under section 114(b) the Court of Federal Claims may render judgment against a third party on claims by the government in two situations: first, where

that party also asserts a claim against the United States; and second, where a plaintiff sues the government for money that the government has disbursed to the third party under a mistake of fact or law. *United States v. Rush*, 804 F.2d 645, 647 (Fed. Cir. 1986); *Bowser Inc. v. United States*, 420 F.2d 1057, 1062, 190 Ct. Cl. 441 (1970). By its language, section 114(b) apparently applies to these government claims, which seek return of the settlement payment, the subject of the bank's suit. The question thus becomes whether the grant of jurisdiction over the government's claims is constitutionally permissible.

Bianchi's constitutional attack on section 114(b) arises from Article III of the Constitution, which provides that

> [t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const., Art. III, § 1. The Court of Federal Claims is established under Article I not Article III. 28 U.S.C. § 171(a) (Supp. IV 1992) ("The Court is declared to be a court established under Article I of the Constitution of the United States").

The Supreme Court tells us that "Article III, § 1, serves both to protect 'the role of the independent judiciary

within the constitutional scheme of tripartite government,' and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 848, 106 S. Ct. 3245, 3255, 92 L.Ed. 2d 675 (1986) (citations omitted). When examining congressional action for impermissible intrusions upon the integrity of the judiciary, the Court has declined to adopt fixed rules, fearing undue restrictions on Congress' Article I powers. *Id.* at 851, 106 S.Ct. at 3257. The task is to consider both the nature of the right to be adjudicated and the concerns that led Congress to deviate from Article III in this statutory scheme. *Id.*

Some disputes, especially those arising between the government and others over the performance of the constitutional functions of the political branches, have historically been subject to resolution exclusively by those branches. *Northern Pipeline Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 67, 102 S. Ct. 2858, 2869, 73 L. Ed. 2d 598 (1982) (plurality opinion). Because such disputes could be resolved without resort to the judicial power of the United States, Congress is free to assign their adjudication to administrative agencies or Article I courts. *See Thomas v. Union Carbide Agric. Prod.,* 473 U.S. 568, 589, 105 S. Ct. 3325, 3337, 87 L. Ed. 2d 409 (1985). These cases are said to involve "public rights"; by contrast, "private rights" cases -- those that fall outside the traditional realm of the political branches -- must be heard under the auspices of Article III. *Northern Pipeline,* 458 U.S. at 70, 102 S.Ct. at 2871.

Government contract disputes are classic public rights matters. Historically, government contracts provided that the

decision of a contracting officer was final on any question under the contract, and not subject to Article III review. *Seaboard Lumber Co. v. United States,* 903 F.2d 1560, 1564 (Fed. Cir. 1990). These provisions withstand constitutional scrutiny because, under the concept of sovereign immunity, the government could always decline to be sued by aggrieved contractors. When Congress later created a right of action on the contract in the Court of Claims, and then in the Article I Court of Federal Claims, it was free to attach conditions to the new right, including the waiver of the right to a jury trial or to an Article III forum. *Id.* at 1563.

This court applied these principles to reject a constitutional challenge to section 114(b) in *United States v. Rush,* 804 F.2d 645, 647 (Fed. Cir. 1986). We determined that the dispute between the government and a third party contractor turned on public rights -- that is, it arose "between the government and persons subject to its authority in connection with the constitutional functions of the executive and legislative branches and ... historically could have been determined exclusively by those branches." *Rush,* 804 F.2d at 647. *See Northern Pipeline,* 458 U.S. at 67, 102 S.Ct. at 2869. *Rush* went no further; resolution of the case before us, however, requires an examination of why *Rush* was a public rights dispute.*

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* Like Bianchi, Rush challenged section 114(b) under both Article III and the Seventh Amendment. The Rush court cited *Maryland Casualty Co. v. United States,* 141 F. Supp. 900 (Ct. Cl. 1956), on which the government relies here. Maryland Casualty upheld the validity of section 114(b) in the face of a Seventh Amendment challenge similar to Bianchi's. But *Maryland Casualty* was decided by the Court of Claims, a court that sat without a jury,

Rush contracted with the Air Force to construct a shopping center on the grounds of Arnold Air Force Station. Because the contract was one for the procurement of services by the government, it was necessarily controlled by the provisions of the Contract Disputes Act (CDA). 41 U.S.C. § 602(a) (1988); *Seaboard Lumber Co.*, 903 F.2d at 1565. Under the CDA, the government waived its right to assert sovereign immunity against Rush's contractual claims in return for the contractor's waiver of his right to an Article III trial of government claims against him. 903 F.2d at 1567. Thus, the government could cross-claim against Rush in the Court of Federal Claims seeking return of an alleged overpayment that was the subject of a surety's suit against the government in that court.

Like the contract in *Rush*, Bianchi's DLA contracts were governed by the CDA, so Bianchi waived his rights under Article III by entering into them. When the government terminated the contracts, Bianchi complied with the CDA and sought relief before the Board of Contract Appeals. The parties then settled the dispute.**

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much like the present Court of Federal Claims, but one that was established under Article III. *Glidden v. Zdanok*, 370 U.S. 530, 584, 82 S. Ct. 1459, 1490, 8 L. Ed. 2d 671(1962); *see* Act of July 28, 1953, § 1, 67 Stat. 226, added to 28 U.S.C. § 171 ("Such court is hereby declared to be a court established under Article III of Constitution of the United States"). *Maryland Casualty* supports the *Rush* Seventh Amendment holding, but it does not constrain our analysis of section 114(b) under the broader scope of Article III.

** Under the settlement, the parties agreed that Bianchi "is entitled to recover $ 617,500.00 on his claims ... , that the Government is entitled to take nothing on its claims ... ; that Mr.

Now the government seeks to recover the money it paid Bianchi under the voluntary settlement, a joint action to fully and finally terminate the prior case. It is not itself a contract for the procurement of goods or services that falls under the CDA, so the terms of that Act do not apply. *Cf. Coastal Corp. v. United States,* 713 F.2d 728, 730 (Fed. Cir. 1983) (rejecting theory that CDA applies to "contracts tangentially connected with government procurement of goods and services"). Absent the controlling provisions of the CDA, there is no historical basis for resolution of the government's claims against Bianchi by the legislative or executive branches. This is not a case involving a right created by Congress or one assigned by the Constitution or tradition to the political branches. Indeed, if the government had sought to recover the settlement payment absent this precipitative suit by the bank, it would have had to sue in the district court. Whatever rights the government may have to recover its officers' allegedly erroneous payments, *see United States v. Wurts,* 303 U.S. 414, 415, 58 S. Ct. 637, 638, 82 L. Ed. 932 (1938), it is not necessarily entitled to advert to an Article I forum.

Nor does Bianchi's waiver of his Article III rights

Bianchi is entitled to interest ... ; and that the parties waive their rights to seek reconsideration of this stipulated decision of the Board or to appeal that stipulated decision ...." Appeals of M. Bianchi of California, ASBCA Nos. 26362, 26363, 26364, 26365, 26366, 26505, 26506, 26513, 26642, 29932, 29933, and 29934 (September 29, 1988). Moreover, Bianchi was required to execute a Certificate of Finality, under which he agreed to accept the award as "a full discharge to the United States of all claims and demands arising out of the matters involved ...." Certificate of Finality, ASBCA Nos. 26362, et al.

under the DLA contracts extend to the settlement. Under the settlement agreement, he accepted a single payment in full satisfaction of his claims under the terminated contracts. The parties agreed that the settlement would be final, and waived any right to reconsideration or appeal to this court. The government was completely discharged from all obligations under the contracts, and, given the broad language of the agreement, Bianchi's obligations, including his contractual duty to submit to Article I jurisdiction, were likewise discharged. The settlement extinguished the prior relationship under the contracts. *Cf. Brock & Blevins Co. v. United States*, 343 F.2d 951, 954, 170 Ct.Cl. 52 (1965). Thus, what was a matter of public rights -- a contractual relationship controlled by the CDA -- became a private rights dispute after the settlement. The government's concern that it might be subject to inconsistent judgments cannot overcome the demands of Article III where the government so clearly had the ability to protect its rights, but surrendered them. The government's claims against Bianchi should have been dismissed for lack of jurisdiction.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-17024
D.C. No. CV-94-00747-LDG

MAURICE BIANCHI fdba	)
M. BIANCHI OF CALIFORNIA,	)
Plaintiff-counterdefendant	)
Appellant,	)
	)
v.	)
	)
DAVID M. WALKER, Comptroller	)
General of the United States	)
General Accounting Office,	)
Defendant-counterclaimant-	)
Appellee,	)
	)
v.	)
	)
BANK OF AMERICA NATIONAL	)
TRUST & SAVINGS	)
ASSOCIATION	)
Counter-defendant/claimant	)
in interpleader-Appellee.	)
	)

PETITION FOR REHEARING

AND
SUGGESTION FOR REHEARING EN BANC

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I.

JURISDICTIONAL BASIS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

1. Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, Maurice L. Bianchi, the above-named Appellant, respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in the above-entitled cause. In support of this Petition, Appellant represents to the Court, as follows:

This Honorable Court issued its decision holding that the United States District Court for the District of Nevada lacked jurisdiction over Bianchi's Complaint in the Nature of Mandamus. That holding was based upon an erroneous and misapprehended belief that Bianchi's Complaint was a contract action by which he sought to liquidate a claim in excess of $10,000.00. See, 28 U.S.C. §1346(a)(2). Bianchi did no such thing. His Complaint in the Nature of Mandamus was specifically premised upon the fact that he had previously received an award from the Armed Services Board of Contract Appeals (ASBCA), a Court of competent jurisdiction pursuant to 41 U.S.C. §601, et seq., and that a writ in the nature of mandamus was necessary in order to compel the appropriate administrative officers of the United States to pay that judgment. Because Bianchi had already obtained a judgment, the District Court had jurisdiction to entertain a complaint in the nature of mandamus pursuant to the provisions of 28 U.S. §1361.

2. Pursuant to the provisions of Rule 35 of the Federal Rules of Appellate Procedure, Maurice L. Bianchi,

the above-named Appellant, respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in the above-entitled cause, en banc. In support of this Petition, the Appellant represents to the Court, as follows:

The Decision in the instant appeal is inconsistent with the Decision of this Honorable Court in a related case, Bianchi v. Perry, 140 F.3d 1294 (9th Cir. 1998) in the following respects:

(a) The Panel deciding the instant appeal determined that the District Court lacked jurisdiction over the Complaint in the Nature of Mandamus; conversely, in Bianchi v. Perry, supra, this Court impliedly determined that the District Court had jurisdiction to entertain the mandamus Complaint seeking to enforce a previously obtained judgment; both judgments had been entered by the same Court pursuant to a singular settlement agreement between Bianchi and the United States;

(b) The Panel herein determined that the Decision in Bianchi v. Perry, supra, was inapplicable to the instant appeal whereas the Panel in Bianchi v. Perry, supra, reached the issue of the VECP claim at issue here and stated, in dicta, that the Appellant was entitled to the VECP award granted by the ASBCA.[1]

Pursuant to the provisions of Rule 35 of the Federal

---

[1] This Court stated at 140 F.2d at 1297: "[The Stipulation to Board Decision] means Bianchi gets $617,500 plus interest, plus whatever he can win on his 'Value Engineering Change Proposal Claims,' plus whatever he can win on his 'Equal Access to Justice Act Claim.'" 140 F.2d at 1297. (Emphasis added).

Rules of Appellate Procedure, Petitioner respectfully suggests to the Judges of this Honorable Court that the above-entitled cause is appropriate for consideration on rehearing by all the Judges of this Court, convened en banc, and in support of this suggestion shows that the Decision of this Honorable Court in the instant appeal is inconsistent with the Decision of Bianchi v. Perry, supra; both the Panel in Bianchi v. Perry, supra, and in the instant appeal were asked to consider and interpret a Stipulation to Board Decision entered into between Mr. Bianchi and the Defense Personnel Support Center in 1988, as that Stipulation to Board Decision was incorporated in Decisions of Administrative Judge Burg of the ASBCA, a Court of competent jurisdiction pursuant to 41U.S.C. §607, and the Government's offset claim.

II.

STATEMENT OF COUNSEL

Scott Michael Cantor, Esq. expresses a belief based upon a reasoned and studied professional judgment that the Decision of this Honorable Court is inconsistent with the Decision of this same Court in the related case of Bianchi v. Perry, supra, in which appeals the Panels were asked to apply res judicata principles to the same Stipulation to Board Decision and Decisions of the ASBCA, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court, to wit: the Panel's Decision in the instant case is contrary to the Decision of another Panel of this Court in the related case of Bianchi v. Perry, supra.

Wherefore, Petitioner respectfully requests:

1. That a rehearing of the appeal in the above-entitled cause be granted; and

2. That the Honorable Judges of this Court order that the above-entitled cause be heard by the Court, en banc.

DATED this 13th day of January, 1999.

GRAZIADEI & CANTOR, LTD.

/s/_____
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Attorneys for Petitioner/Appellant

III.

CERTIFICATE OF COUNSEL FOR APPELLANT

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

GRAZIADEI & CANTOR, LTD.

/s/_____
GEORGE E. GRAZIADEI, ESQ.
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IV.

STATEMENT OF RELATED CASES

There are no related cases currently pending. Related case, Bianchi v. Perry, 140 F.3d 1294 (9th Cir. 1998), has been decided.

V.

INTRODUCTORY STATEMENT

In 1988, Appellant, Maurice L. Bianchi, entered into a Stipulation to Board Decision with the Defense Personnel Support Center to resolve various appeals presented to the ASBCA pursuant to the Contract Disputes Act, 41 U.S.C. §601, et. seq., and the incorporation of that Stipulation to Board Decision in Decisions of the ASBCA, a Court of competent jurisdiction to resolve Government/Contractor disputes pursuant to 41U.S.C. §607.

The said Stipulation to Board Decision and the Decisions of Administrative Judge Burg of the ASBCA, at various stages of litigation, awarded Mr. Bianchi:

1) $617,500, plus interest;

2) The right to pursue a claim for Equal Access to Justice Act litigation fees and expenses; and

3) The right to pursue a Value Engineering Change Proposal claim.

In the Stipulation to Board Decision, as incorporated in the Decision of the ASBCA, the parties waived their rights to appeal.

The Government first paid the $617,500.00, plus interest. Two years later, Bank of America National Trust & Savings Association (the Bank), brought a claim against the United States in the U.S. Court of Federal Claims. The Government then filed a third-party claim in the same action against Mr. Bianchi, seeking return of the monies paid. On Crossmotions for Summary Judgment, the Court of Federal Claims granted the Government's Motion for Summary Judgment against Mr. Bianchi and its Motion for Summary Judgment against the Bank. That case was appealed to the United States Court of Appeals for the Federal Circuit which, in a reported decision, Bank of America National Trust & Savings Association v. United States, 23 F.3d at 380 (Fed. Cir. 1994), upheld the viability of the Government's agreement and Stipulation to Board Decision entered into with Bianchi and ruled further that the United States could not set-off against that award.

By a subsequent Decision of the ASBCA pursuant to the Stipulation to Board Decision, Mr. Bianchi was awarded $475,724.51 in Equal Access to Justice Act (EAJA) fees. The Government refused to pay that ASBCA Judgment upon the grounds that it allegedly had an offset in favor of the Small Business Administration (SBA) which exceeded the amount of the Judgment in favor of Bianchi, the very same SBA set-off rejected by the Federal Circuit. Because the United States refused to pay the EAJA award granted him by the ASBCA, Mr. Bianchi brought a Complaint in the Nature of Mandamus in the United States District Court for the District of Nevada.

Upon Crossmotions for Summary Judgment, the District Court granted judgment in favor of the United States and against Mr. Bianchi. That matter was appealed to this Honorable Court in Bianchi v. Perry, supra. This Honorable Court found no defect in the jurisdiction of the District Court to entertain the mandamus claim, determined that the decision of the United States Court of Appeals for the Federal Circuit was res judicata and had preclusive effect as to the Government's claim for offset in that case and ruled in Mr. Bianchi's favor, holding that he was entitled to the EAJA funds which the Government promised to pay and the ASBCA had awarded him.

Pursuant to the same Stipulation to Board Decision, the ASBCA also issued a Decision in Mr. Bianchi's favor upon his VECP application, awarding him $58,613.03. The Government refused to pay that amount, asserting the same SBA offset that had been rejected by the Federal Circuit in Bank of America v. United States, supra, and, subsequently, by this Honorable Court in Bianchi v. Perry, supra. Although the Federal Circuit Court ruled, in effect, that the Government had incurred double liability, that is liability to both Bianchi and to the Bank, the latter being based upon preclusive rights by assignment, the United States, nevertheless, brought a Counterclaim for Intervention and successfully obtained the intervention of the Bank in the instant litigation. On Crossmotions for Summary Judgment, the District Court granted summary judgment in favor of the Bank upon its intervention claim and entered judgment against the Comptroller General and Mr. Bianchi. As this Court noted in its Decision in the instant case, the Order of the District Court provided, in part:

> "Pursuant to this Court's Order, JUDGMENT is entered in favor of Counterdefendant/Claimant in interpleader Bank of America National Trust & Savings Association, and against Plaintiff Maurice Bianchi fdba as M. Bianchi of California (Bianchi) and Defendant/Counterclaimant Charles Bouscher, Comptroller General of the United States General Accounting Office. Defendant/Counterclaimant Charles Bousher shall pay to the Bank of America National Trust & Savings Association the amount of $58,613.03, plus interest due from November 17, 1987."

Bianchi v. Walker, Case No. 97-17024, filed December 11, 1998. (Emphasis added). This Honorable Court, on appeal, determined, sua sponte, that the District Court lacked jurisdiction over the Complaint in the Nature of Mandamus because the Court erroneously concluded that Mr. Bianchi sought a money judgment from the United States whereas, in fact, he had already obtained a money judgment against the United States and brought the action in the nature of mandamus pursuant to 28 U.S.C. §1361 to compel the appropriate administrative officer to pay the amount of the previously obtained Judgment. This Honorable Court also erroneously determined that the action against Mr. Bianchi was not final and, therefore, his appeal was, in effect, premature despite the Judgment in favor of the Bank which awarded it the amount of the VECP claim and entered judgment against Mr. Bianchi upon his claim in the nature of

mandamus.[2]

Because this Honorable Court misapprehended or misperceived the fact that the Complaint in the Nature of Mandamus, below, sought to enforce a judgment previously obtained and because this Honorable Court misapprehended or misperceived the fact that the Judgment entered in the District Court was fully dispositive of Bianchi's claims, rehearing of the appeal is appropriate pursuant to FRAP 40.

Moreover, the Petitioner suggests that because the Decision of this Honorable Court in the instant appeal is inconsistent with the Decision of this Honorable Court in Bianchi v. Perry, supra, with respect to, among other things, the jurisdiction of the District Court to entertain the Complaint, a rehearing by the Court, en banc, is appropriate.

VI.

THE DISTRICT COURT HAD JURISDICTION

A. The ASBCA is a Court of competent jurisdiction with authority to grant the same types of relief as are available in the United States Court of Federal Claims; Bianchi had the election to proceed either before a Board of Contract Appeals or before the

---

[2] When the case was presented to the District Court, neither the Bank, nor the Government, conceded the holding of the Federal Circuit Court that the Government had incurred liability to both Bianchi and the Bank. There being only "one" VECP award, the District Court awarded it to the Bank, entering judgment against the Comptroller General and Bianchi.

Court of Claims.

The ASBCA, the agency which rendered judgment in favor of Bianchi upon his VECP application, is an agency board of contract appeals within the meaning of 41 U.S.C. §607. That statute provides, in relevant portion:

> "(a)(1) Except as provided in subparagraph (2) an agency board of contract appeals may be established within an executive agency . . . ."
>
> (d) Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims . . . ."

41 U.S.C. §607. (Emphasis supplied).

The Contract Disputes Act (41 U.S.C. §601 et. seq.) which, among other things, has established the Boards of Contract Appeals, was intended to provide Government contractors with speedy, efficient and economical means for handling disputes relating to Government contracts and that among such devices is an election, at the contractor's option, permitting access to either the Contract Appeals Board or to

the U.S. Court of Federal Claims; in the event the contractor elects to utilize a Board, Congress has provided the Board with authority to grant the same relief as is currently available to litigants asserting contract claims before the Court of Federal Claims. See, E-Systems, Inc. (1979) ASBCA 79-1 CCH BCA Dec. ¶13806. see, also, Nome Pharmacy, Inc. (1980) ASBCA 80-1 CCH BCA Dec. ¶14279.

B. The Tucker Act is inapplicable; Bianchi had already made an election and received a judgment from the ASBCA. The District Court had jurisdiction to entertain a Complaint in the Nature of Mandamus pursuant to 28 U.S.C. §1361.

As appears by the record of this case, Mr. Bianchi obtained an award from the ASBCA, a Court of competent jurisdiction, upon Bianchi's election to proceed in a Board of Contract Appeals rather than before the U.S. Court of Federal Claims.

As with other judgments, interest is allowed upon the Board of Contract Appeals' decisions in favor of the contractors pursuant to the terms of 41U.S.C. §611. Moreover, 41 U.S.C. §612 provides that judgments of the United States Court of Federal Claims and monetary awards of the agency Boards of Contract Appeals shall be paid in accordance with the procedures provided by 31 U.S.C. §1304, which establishes the manner for payment of judgments, awards and compromised settlements. 31 U.S.C. §1304(3)(C) specifically provides for payment from the judgment fund of judgments "under a decision of a board of contract appeals. . ." 31U.S.C. §1304(3)(C).

Clearly, the ABCA's VECP award constituted a judgment of a Court of competent, statutorily mandated jurisdiction. Therefore, the judgment having already been obtained, the District Court had jurisdiction to entertain the Complaint in the Nature of Mandamus brought pursuant to 28 U.S.C. §1361.

Moreover, because the contractor had the election to proceed in either the Court of Federal Claims or the Board of Contract Appeals, this Court's determination that it is necessary for Bianchi to bring his claim for money damages before the Claims Court is erroneous.

28 U.S.C. §1361 provides, as follows:

> **"1361. Action to compel to officer of the United States to perform his duty.**
> The District Court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff."

28 U.S.C. §1361.

The purpose of 28 U.S.C. §1361 is to extend the power of the District Courts outside of the District of Columbia to compel official action by mandatory order in those cases involving non-discretionary ministerial duties. Switzerland Co. v. Udall, 225 F.Supp, 812 (D.C.N.C. 1964), aff'd. 337 F.2d 56 (4th Cir. 1964), cert. den. 380 U.S. 914, 13 L.Ed.2d 800, 85 S.Ct. 900 (1965). Therefore, mandamus is available to compel the Government's officer to

pay the monies due Bianchi pursuant to that award.

As pleaded on the face of Bianchi's Complaint in the Nature of Mandamus, the action was also brought pursuant to the jurisdictional provisions of 28 U.S.C. §1331 which provides, in relevant portion:

> "The District Court shall have original jurisdiction of all civil actions arising out of the constitution, laws, or treaties of the United States."

The present language of 28 U.S.C. §1331 was adopted on December 1, 1980 by P.L. 96-486. The purpose and effect of that 1980 amendment was to eliminate a $10,000.00 minimum amount in controversy requirement in the remaining Federal question cases to which it still applied. There is no need to allege a general Federal question under 28 U.S.C. §1331 where it is clear that the action involves a particular Federal question of which the District Court had jurisdiction. Whether a suit arises under the laws of the United States must be determined by the Plaintiff's Complaint, not the Defendant's Answer. See, North American Phillips Corporation v. Emery Air Freight Corporation, 579 F.2d 229 (2d Cir. 1978).

In the instant case, Bianchi's underlying claim arose pursuant to the laws of the United States, that is, pursuant to the Contract Disputes Act, 41U.S.C. §601, et seq., and his Complaint was specifically founded upon 28 U.S.C. §1361 as a consequence of the Government's refusal to pay an award previously rendered in his favor by a United States Court of competent jurisdiction, to wit: the ASBCA.

Bianchi was not required to bring his action for recovery before the United States Court of Federal Claims in the first instance, nor is he required to do so now. E-Systems, Inc., supra; Nome Pharmacy, Inc., supra.

Moreover, the United States Court of Federal Claims is without jurisdiction to entertain a mandamus action. The jurisdiction of that Court is and has been limited to monetary claims against the United States Government. That Court does not have general equitable powers (such as to render declaratory judgments or, as here argued, to issue a writ in the nature of mandamus). Bianchi had already obtained the ASBCA award. The Court of Claims, therefore, would have no jurisdiction to compel the appropriate administrative officer to pay that claim. See, United States v. King, 395 U.S. 1 (1969); United States v. Testan, 424 U.S. 392. (1976).

C. Bianchi's claim concerning the assignments was misperceived.

Mr. Bianchi's argument that the Federal Circuit's Decision in Bank of America v. United States, supra, establishes that he is entitled to recover on the settlement agreements irrespective of whether the Government remains liable to the Bank, was conclusively resolved in his favor by the United States Court of Appeals for the Federal Circuit in Bank of America v. United States, supra, as this Court, itself, acknowledged in Bianchi v. Perry, supra. The District Court, however, entered judgment against Bianchi and the Comptroller General and in favor of the Bank. Therefore, the effect of the District Court's Order is to preclude Bianchi from recovering upon the VECP claim which this Court in Bianchi v. Perry, supra, specifically stated he was entitled to

receive.

Secondly, this Court has not addressed the issue of the effect of the extinguishment of the Bank's assignments. Bianchi does not here argue that the assignments were invalid. Bianchi has argued, however, that during the pendency of the action below, the Bank obtained a judgment against the United States in the United States Court of Federal Claims which allowed the Bank to recover the full amount it was entitled to recover as a matter of law. The Bank's Motion for Summary Judgment below was prosecuted after the Bank had received full payment on the assignments and those assignments were, thus, extinguished, as a matter of law. By affirming the judgment in favor of the Bank, this Court has allowed it a double recovery, once in the United States Court of Federal Claims upon the assignments and, again, in the United States District Court upon the same assignments, although they were extinguished by the first recovery.

Therefore, when these dispositions are considered together, this Honorable Court's decision is inconsistent with the Decision of this Court in Bianchi v. Perry, supra, and with the United States Court of Appeals for the Federal Circuit in Bank of America v. United States, supra. Bianchi has been deprived of his right to recover on a VECP application which this Court, in the related case, stated he was entitled to recover while the Bank was twice awarded monies upon the same obligation.

D. If the District Court lacked jurisdiction over Bianchi's claim, it also lacked jurisdiction over the Bank's claim.

This Honorable Court's opinion is internally inconsistent. This Court has held that the District Court did not have jurisdiction to entertain Bianchi's claim because he sought to liquidate a damage claim against the Government in excess of $10,000.00. On the other hand, this Court's Decision states that the 'District Court has jurisdiction over the intervention Counterclaim and, therefore, over the Bank's claim although the Bank attempted to liquidate a monetary claim against the United States for a sum in excess of $10,000.00. Bianchi's claim had already been liquidated by the ASBCA's award; the Bank's claim was unliquidated. Therefore, the Bank's claim, if valid, must be (and was) brought in the U.S. Court of Federal Claims. If the District Court lacked jurisdiction over the Complaint, it had no jurisdiction to entertain the Counterclaim.

VII.

CONCLUSION

Based upon the foregoing, rehearing is appropriate and the Petitioner respectfully suggests that a rehearing, en banc, is necessary to resolve inconsistencies and conflicts within and among Decisions of this Circuit involving related cases based upon the same operative Stipulations and Court decisions.

DATED this 13th day of January, 1999.

Respectfully submitted,

GRAZIADEI & CANTOR, LTD.

/s/_____
GEORGE GRAZIADEI, ESQ.
SCOTT MICHAEL CANTOR, ESQ.
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888 Seventeenth Street, N.W.
Washington, D.C. 20006
Attorneys for MAURICE BIANCHI

VIII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC** was served by U.S. Mail this 13th day of January, 1999, upon the following:

DAVID M. COHEN, ESQ.
MARK MELNICK, ESQ.
U.S. Department of Justice
Commercial Litigation Branch
Civil Division
Attn: Classification Unit
1100 L Street, N.W., 8th Floor
Washington, D.C. 20530

KATHRYN E. LANDRETH, ESQ.
United States Attorney
701 East Bridget Avenue, Suite 800
Las Vegas, Nevada 89101

GARY R. GOODHEART, ESQ.
DIANA L. SULLIVAN, ESQ.
JONES VARGAS
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, Nevada 89109

/s/_____
An employee of GRAZIADEI & CANTOR, LTD.

APPENDIX G

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed February 17, 1999]

No. 97-17024
D.C. No. CV-94-00747-LDG

MAURICE BIANCHI fdba M. BIANCHI OF CALIFORNIA, Plaintiff-counterdefendant Appellant,

v.

CHARLES BOUSHER, Comptroller General of the United States General Accounting Office, Defendant-counterclaimant-Appellee,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION Counter-defendant/claimant in interpleader-Appellee.

ORDER

Before: ALARCÓN, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges O'Scannlain and Fernandez voted to reject the petition for a rehearing en banc. Judge Alarcón recommend the rejection of the petition for a rehearing en banc.

The full court has been advised of the petition for en banc hearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the petition for a rehearing en banc is rejected.

APPENDIX H

BEFORE THE
ARMED SERVICES BOARD
OF CONTRACT APPEALS
ALEXANDRIA, VIRGINIA 22332-0700

Appeal of	)	
	)	
M. BIANCHI OF CALIFORNIA	)	
	)	ASBCA Nos.
Under Contract Numbers:	)	26362, et al.
DLA100-79-C-2894	)	
DLA100-80-C-2290	)	
DLA100-80-C-2972	)	
	)	

STIPULATION TO BOARD DECISION

The parties to the above-listed appeals agree to stipulate to the following decision by the Board:

*1. The parties agree that Mr. Masurice Bianchi, as the successor to M. Bianchi of California, is entitled to recover $617,500.00 on his claims in the following appeals: ASBCA Nos. 26362, 26363, 26364, 26365, 26366, 26505, 26506, 26513, 26642, 29932, 29933 and 29934; that the government is entitled to take nothing on its claims in the following appeals: ASBCA Nos. 26362, 26363, 26364, 26365, 26366, 26505, 26506, 26513, 26642, 29932, 29933 and 29934; that Mr. Bianchi is entitled to interest computed

in accordance with Clauses L78 (Disputes (1979 MAR)) of the contracts, at the rates prescribed by the Secretary of the Treasury, under the Renegotiation Act, Public Law 92-41, on the principal amount of $617,500, such interest to run from June 18, 1981 until the date of payment; and that the parties waive their rights to seek reconsideration of this stipulated decision of the Board or to appeal that stipulated decision;

*2. This settlement is without prejudice to Mr. Bianchi's right to pursue any and all Value Engineering Change Proposal Claims under his contracts with DPSC; and

*3. This settlement is without prejudice to Mr. Bianchi's right to pursue an application under the Equal Access to Justice Act to recover whatever legal fees and litigation expenses to which he may be entitled in connection with these claims and appeals. The parties stipulate that the issues of prevailing party and substantial justification will be decided on the basis of the record made at the first trial. The parties agree that the application for legal fees and litigation expenses under the Equal Access to Justice Act will be submitted within thirty days of receipt by appellant of the agreed-upon settlement payment."

Except as noted above, Appellant and the government agree to stipulate to the dismissal of these appeals with prejudice.

Respectfully Submitted,

/s/_____
D. Michael Fitsbogh
MCKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005

Attorney for Appellant
M. Bianchi of California
Dated: September 27, 1988

/s/ _____
Michael J. McConigie
Chief Trial Attorney
DPSC-GA
2300 South 20th Street
Philadelphia, Pennsylvania 19101-8419

Attorney for the Government
Dated: September 27, 1988

APPENDIX I

Appeals of	)	
	)	ASBCA Nos.
M. BIANCHI OF CALIFORNIA	)	26362, 26363,
	)	26364, 26365,
Under Contract Numbers:	)	26366, 26505,
DLA100-79-C-2894	)	26506, 26513,
DLA100-80-C-2290	)	26642, 29932,
DLA100-80-C-2972	)	29933, 29934
	)	

APPEARANCES FOR THE APPELLANT:

D. Michael Fitzhugh, Esq.
McKenna, Conner & Cuneo
Washington, D.C.

APPEARANCES FOR THE GOVERNMENT:

Michael J. McGonigle, Esquire
Chief Trial Attorney
Defense Personnel Support Center (DLA)
Philadelphia, Pennsylvania

OPINION BY ADMINISTRATIVE JUDGE BURG

The parties to the above-listed appeals have agreed to the following stipulation:

The parties agree that Mr. Maurice Bianchi, as

the successor to M. Bianchi of California, is entitled to recover $617,500.00 on his claims in the following appeals: ASBCA Nos. 26362, 26363, 26364, 26365, 26366, 26505, 26507, 26513, 26642, 29932, 29933, and 29934; that the government is entitled to take nothing on its claims in the following appeals: ASBCA Nos. 26362, 26363, 26364, 26365, 26366, 26505, 26506, 26513, 26642, 29932, 29933, and 29934; that Mr. Bianchi is entitled to interest computed in accordance with Clauses L78 (Disputes (19769 MAR)) of the contracts, at the rates prescribed by the Secretary of the Treasury, under the Renegotiation Act, Public Law 92-41, on the principal amount of $617,500, such interest to run from June 18, 1981 until the date of payment; and that the parties waive their rights to seek reconsideration of this stipulated decision of the Board or to appeal that stipulated decision;

This settlement is without prejudice to Mr. Bianchi's right to pursue any and all Value Engineering Change Proposal Claims under his contracts with DPSC; and

> This settlement is without prejudice to Mr. Bianchi's right to pursue an application under the Equal Access to Justice Act to recover whatever legal fees and litigation expenses to which he may be entitled in connection with these claims and appeals. The parties stipulate that the issues of prevailing party and substantial justification will

be decided on the basis of the record made at the first trial. The parties agree that the application for legal fees and litigation expenses under the Equal Access to Justice Act will be submitted within thirty days of receipt by Appellant of the agreed-upon settlement payment.

DECISION

It is the Board's decision, pursuant to 41 U.S.C. § 607(d), § 612(b), and the parties' stipulation and agreement, that the appeals are sustained. In the nature of a consent judgment the board makes a monetary award in the amount of $617,500 with interest from 18 June 1981.

Dated: 29 September 1988

/s/_____
RUTH C. BURG
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

I concur

/s/_____
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman, Armed Services
Board of Contract Appeals

I concur

/s/_____
ALAN M. SPECTOR
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

ASBCA Nos. 26362 26353 26364
26365 26366 26505
26506 26513 26642
29932 29933 29934

[Filed September 20, 1990]

Application Under Equal Access to Justice Act -

M. Bianchi of California

Under Contract Nos. DLA100-79-C-2894,
DLA100-80-C-2990, DLA100-80-C-2972

APPEARANCE(S) FOR THE APPLICANT:

Michael A. Hordell, Esq., Petrillo & Hordell, Washington, D.C.

APPEARANCE FOR THE GOVERNMENT:

Alvin M. LaCoste, Esq., Wayne J. Bober, Esq., Trial Attorneys, Defense Personnel Support Center (DLA), Philadelphia, Pennsylvania.

OPINION BY ADMINISTRATIVE JUDGE BURG

On 29 September 1989 the Board issued its opinion on many of the issues involved in this application for attorney's fees and expenses under the Equal Access to Justice Act, 5 U. S. C. § 504, and remanded the matter to the parties for negotiation in accordance with that decision (ASBCA No. 26362, et al, 90-1 BCA para. 22,369). The parties were

unable to reach agreement on quantum. Since a settlement conference with the parties and the presiding judge also proved unsuccessful, the Board will resolve quantum based upon the extensive documentation filed by the parties.

In our decision on the merits of this application, we set forth a detailed discussion about the contracts involved in the dispute, the settlement of which resulted in this application. We see no necessity for a detailed repetition in this opinion. We concluded (1) that the Government's position was not substantially justified in failing to grant applicant an extension of time for imposition of a first article inspection requirement, (2) that the Government's position was substantially justified as to the pattern problems arising under these contracts, (3) that the Government was not substantially justified in refusing to extend delivery dates under Contract 2894, so that the contractor was forced to accelerate production under that contract, (4) that the Government was not responsible for costs incurred in prioritizing Contract 2290 before Contract 2284, (5) that applicant is limited in its recovery of attorney fees to a maximum of $ 75.00 per hour, (6) that the parties should negotiate the impact on legal fees caused by the applicant's change of attorneys three (now four) times during the course of this litigation and the impact of assignment and reassignment of Government counsel numerous times during the course of this litigation, (6) that the parties should negotiate whether any discovery in these appeals was unnecessary and should not be subject to reimbursement to applicant, (7) that fees and expenses for Mr. Bianchi were not reimbursable under this application, (8) that, under current regulations, expert witness fees are limited to $ 33.53 per hour plus travel and per diem expenses, (9) that accounting fees and expenses should be recalculated limiting professional

fees to $ 75.00 per hour and eliminating any clerical services, such as word processing or typing which are considered office overhead expenses typically subsumed in professional hourly rates, and (10) that reasonableness of the number of accounting hours claimed should be negotiated by the parties.

When the parties were unable to resolve the quantum by negotiation, they submitted extensive briefs and documentation setting forth the specific amounts and items upon which they were unable to agree. Following the settlement conference, applicant made another submission in which it made additional adjustments to reflect matters raised by the Government. Applicant's revised claim is $925,441.83, reduced from its original claim of $1,998,720.15 prior to our opinion on entitlement. We shall only discuss those items still in dispute between the parties.

Allocation and Reasonableness of Legal Fees

The major area of dispute between the parties concerns the allocation of the fees and expenses among the various matters involved in these appeals. As recited in our prior opinion, only five of the numerous issues before the Board in these appeals were the subject of a hearing and the appeals were settled, reserving several matters, prior to issuance of a formal decision on the litigated issues. One reservation was:

> c. This settlement is without prejudice to Mr. Bianchi's right to pursue an application under the Equal Access to Justice Act to recover whatever legal fees and litigation expenses to which he may be entitled in connection with these claims and appeals. The Parties stipulate

> that the issues of prevailing party and substantial justification will be decided on the basis of the record made at the first trial.

The parties are not in agreement as to the impact of this reservation on allocation of allowable fees and litigation expenses. The Government's position is that allocation should be based solely on our determinations of prevailing party and substantial justification on the litigated issues without any consideration of the issues which were not tried but which were part of the settlement. Therefore, it proposes that the allocation should be on some objective basis such as the ratio of proposed findings of fact in applicant's post-hearing brief for issues in which we concluded the Government's position was substantially justified or applicant was not the prevailing party (80 percent) or the ratio of the number of exhibits introduced into evidence at the hearing using the same approach (which calculates to approximately 74 per cent).

Applicant maintains that this was not the intent of the parties in entering into the reservation set forth above and that the allocation must take into consideration all issues which were included in the settlement and the various stages at which the fees and expenses were incurred. Neither of the present Government counsel participated in the actual settlement of these appeals on the merits or in the drafting of the settlement agreement or release language set forth above. We conclude that the Government's proposal for an allocation on either basis set forth above or some similar basis is too mechanical for the resolution of this issue. It also fails to recognize substantial Government claims totalling over $2,500,000 (for excess costs of reprocurement, recovery of alleged unliquidated progress payments, costs of unreturned

Government furnished material, and reduction in price for delivery of substandard items) which were not pursued by the Government as a result of the settlement of these appeals. We, therefore, conclude that recovery of fees and expenses is not to be based solely on our determinations concerning the litigated issues.

Nor can we agree with the Government that the applicant has failed to properly itemize or segregate its application on the basis of the various issues or that the amounts charged are unreasonable. This is not a situation where the applicant has presented us with unsupported figures. The application is supported with in excess of a file drawer of data, including detailed, itemized statements from each of the law firms and experts involved in these appeals. To require the depth of detail demanded by the Government would require that an entire new accounting system be developed for any appeal which would potentially have an application filed under the Equal Access to Justice Act and, in our view, would go far beyond the types of detail necessary for us to reach a jury verdict. We recognize that the most difficult types of allocation involve situations where the parties have settled their disputes, but that does not preclude recovery under the Equal Access to Justice Act.

In our decision on the merits of this application, we indicated that the claims involved in the underlying appeals were intertwined and difficult of segregation. By the same token, we cannot use any of the mechanistic approaches suggested by the Government in allocating legal fees and expenses. Nor were many of the legal fees and expenses incurred capable of the type of billing segregation which the Government argues should have been maintained. Applicant,

recognizing that some allocation must be made, has suggested the total amount it seeks in this application be reduced by $100,000. There is no rationale or basis for using this amount to reach a jury verdict and we decline to do so.

The problems involved in allocating between the fees and expenses which are recoverable under EAJA is the reason that the parties were urged to negotiate a settlement based on our entitlement opinion. Their failure to do so will not preclude this Board from reaching a jury verdict since the detailed and carefully prepared submittals by the applicant do give us a basis for reaching such a verdict.

Analysis of the services of each of the three law firms which represented the applicant up to and including the final briefings of quantum under this application makes it possible to reach a jury verdict for that portion of the legal fees and expenses which we conclude are recoverable under this application. Applicant's first legal counsel, Paul, Gordon & Friedland, was involved in early stages of the appeals. This included the initial discovery, including depositions, and the designation of issues which the parties considered the major areas of dispute. As previously noted, it was anticipated at the time of such designation that, if those issues were resolved, the parties would probably be able to negotiate settlements as to the remainder. A great amount of time was spent reviewing documentary evidence -- a necessary exercise before one could even begin to determine to which issue or issues particular evidence pertained. This discovery was not limited to the issues which did go to hearing but encompassed all of the issues, including the Government claims of $ 2.5 million. We estimate that about half of this firm's efforts pertained to matters as to which appellant was the prevailing party and the

Government's position was not substantially justified. Therefore, we conclude that appellant is entitled to recover 50 per cent of allowable legal fees for the services of Paul, Gordon & Friedland.

That firm was replace prior to the oral hearing of the litigated issues by the legal firm of Rogers and Wells. As its request, an additional issue was added and it prepared, tried and briefed the litigated issues and attempted to negotiate a settlement before and after post-hearing conferences concerning probable outcome of the litigated issues. Since most of its efforts concerned the issues for which we have reached conclusions as to who was the prevailing party and for which the Government's position was or was not substantially justified, we conclude that -- based on our earlier decision as to prevailing party and substantial justification -- 30 per cent of the allowable legal fees of Rogers & Wells are recoverable under this application.

Applicant was then represented by McKenna, Conner & Cuneo, who became involved after unsuccessful settlement negotiations by the parties after hearing, briefing and post-hearing negotiations. They were involved in settlement negotiations with and without the presiding judge, preparation for trial of all remaining issues, including quantum, ultimate settlement of the appeals and preparation and presentation of the application for legal fees and litigation expenses for these appeals. The applicant argues that all of the efforts of McKenna, Conner & Cuneo were after litigation and briefing and were directed toward preparation for hearing of the remaining issues and of quantum and the fees and expenses involved in this application. However, recovery can be had only for that portion of the fees and expenses involved in this

application in which applicant is considered the prevailing party and the Government's position was not substantially justified. It is for this reason that we do not agree with applicant's segregation of expenses into those incurred before 30 June 1986 (the date of the last submittal of proposed findings of fact following the oral hearing on a portion of the issues involved in the appeals) and those incurred after that date or that all time in compiling and submitting the EAJA claim is recoverable. We conclude -- again based on our estimate of what work pertained to matters as to which appellant was the prevailing party and the Government's position was not substantially justified -- that the applicant is entitled to recover 75 per cent of the allowable legal fees of McKenna, Conner & Cuneo.

In summary, we have reached the following conclusions regarding the percentage of allowable fees which should be recovered by applicant:

Paul, Gordon & Friedland	50%
Rogers & Wells	30%
McKenna, Conner & Cuneo	75%

The Government further argues that applicant's fees are unreasonable since they include additional hours generated because of two changes in counsel by applicant and because of unnecessary depositions taken by appellant. The hours are challenged in the abstract. No specific number of hours are designated. Because of the number of appeals and the complexity of issues presented, we conclude that the number and length of depositions was not unreasonable. To the extent that there might have been additional billable hours caused by change in counsel, they have been included in the jury verdict

percentages set forth above. The Government also challenges estimated legal and accounting fees for additional services anticipated as a result of this opinion. The application includes five hours for such legal and six hours for such accounting fees. Since the applicant again changed its counsel after closing of the record for this application, we have allowed one hour for a telephone conference call between counsel and the presiding judge on this matter on 12 July 1990, and have reduced the total fees for McKenna, Conner & Cuneo by four hours ($ 300.00), resulting in claimed legal fees of $ 160,598 for that firm.

The hours claimed have been adjusted by applicant to reflect the other amounts which the Government has challenged. We see no need to set them forth here since they are clearly delineated in the schedules attached to applicant's submittal of 3 May 1990. Total legal fees, therefore, are as follows:

Paul, Gordon & Friedland	$ 190,725.00 x 50%	= $ 95,362.50
Rogers & Wells	174,412.50 x 30%	= 52,323.75
McKenna, Conner & Cuneo	160,598.00 x 75%	= 120,448.50
	TOTAL	$ 268,134.75

Expenses

Applicant has conceded certain adjustments made in expenses which it claims. Applying these adjustments and allocating the expenses on the same basis that legal fees have been allocated, we conclude applicant is entitled to recover expenses as follows:

Paul, Gordon & Friedland	$ 50,538.31 x 50%	= $ 25,269.16

Rogers & Wells	90,266.96 x 30% =	27,080.09
McKenna, Conner & Cuneo	18,584.00 x 75% =	13,938.00
	TOTAL	$ 66,287.25

Paralegal Expenses

The application contains paralegal fees billed by Paul, Gordon & Friedland and by McKenna, Conner & Cuneo. No paralegal fees were billed by Rogers & Wells. The paralegal engaged by Paul, Gordon & Friedland, was an independent contractor who was paid $ 25 per hour by the firm and the Government does not challenge that the amount claimed of $32,540 represents paralegal costs to that firm.

Paralegal fees for McKenna, Conner & Cuneo were billed at $ 75 per hour. Recognizing the limitation to recovery under EAJA for cost to the law firm for its paralegals by this and other Boards, in its initial application, paralegal fees for 689.5 hours were included at a rate of $ 48 per hours for a total of $ 33,321.70. In its 15 March 1990 submittal (after our decision on entitlement) the Government challenged this hourly rate and argues that the hourly rate should be based on the annual salary paid the paralegal ($ 26,600) plus pension contribution, FICA and bonus ($ 6,650) divided by annual working hours of 2080. This calculates to $ 16 per hour. The Government, therefore, argues that the allowable amount should be $ 11,032 rather than the amount claimed by applicant. We do not agree with the applicant that the Government's challenge of the hourly rate was untimely.

The difference results from inclusion of indirect costs in the hourly rate computed based on the method of allocating

indirect costs and by basing the hourly rate on 1300 billable hours per paralegal per year used for accounting and budgeting purposes by the McKenna, Conner & Cuneo, East Coast Practice Group. The Government argues that these expenses should be subsumed in the legal fees not as part of paralegal costs. We conclude that it is appropriate to include indirect costs as part of the cost to the law firm of its paralegals since they generate indirect costs for the firm. Nor do we consider the method of allocation of these indirect costs unreasonable.

We see no necessity to recite in detail the method by which the indirect costs were determined (App.'s Suppl. Brief in Support of Its Application for Fees Pursuant to the EAJA, 16 Feb. 1990, Exh. 3). The indirect costs applied in this instance are less than half of the total figure included in the claim for the hourly paralegal rate. The Government has not disputed the underlying figures or method of computation and we conclude that they appear reasonable. By the same token, the utilization of 1300 hours per year rather than 2080 is acceptable to us. The amount of unbillable time during the year becomes part of overhead for an employee and is an appropriate part of the cost to the firm for the paralegal's services. We, therefore, hold that applicant is entitled to reimbursement under EAJA for the proportionate amount of paralegal hours which we have concluded should be allowed for services of the particular law firm involved.

Paul, Gordon & Friedland	$ 32,540.00 x 50% =	$ 16,270.00
McKenna, Conner &	33,321.70 x 75% =	24,991.28

Cuneo

TOTAL $ 41,261.28

Accounting Expenses

Applicant includes accounting fees and expenses from three sources in its claim. The charges have been adjusted to reflect the limitation of $ 75 per hour maximum allowable fees and to eliminate any duplication of charges where listed both directly and included in the invoices of various legal firms, as follows:

Gene G. Burnhurst, Accountant	1,366.00 hrs(1982-84)	$ 15,160.00
H.K. Grimshaw		
1983	unk. hrs	356.00
1987	unk. hrs	275.00
Peter Elliott Accountancy Corp.		
1983	145.30 hrs	8,894.00
1984	305.00 hrs	18,368.03
1985	109.75 hrs	7,628.15
1986	25.25 hrs	1,872.75
1987	156.50 hrs	12,839.16
1988	276.50 hrs	22,131.59
1989-90	307.25 hrs	18,640.70

The Government has challenged some of the expenses of the Peter Elliott Accountancy Corp., most especially invoices dated 5, 18 and 24 April 1990. Each of these invoices is attached to applicant's submittal of 3 May 1990 and indicates it was related to updating the EAJA claim or

was related to attending the settlement conference at this Board. The Government also argues that Mr. Elliott's presence was not required at the settlement conference so that all fees and expenses related to his attending that conference should be disallowed as unreasonable. We do not agree. The conference was an attempt to negotiate the quantum to be paid under EAJA based on the Board's entitlement decision since the parties had been unable to resolve the matter. While it was unsuccessful, the presence of the accountant who prepared the detailed schedules which were the basis for the quantum was both understandable and reasonable. The Government also challenges that 17 hours were spent revising the EAJA claim for final submission on the theory that it was prepared using a "lotus" type spreadsheet software program which the Government argues a clerk could have modified in two or three hours. We do not consider this argument by counsel in his letter of 16 May 1990 a sufficient basis for holding the charge unreasonable. The claim summary comprised 22 printed pages of spread sheets with a number of changes on a line by line basis to adjust for corrections and limitations on hourly rates. Corrections consisted of more than the mechanical correction of spread sheets. Someone had to review and note the corrections as well as review the corrected schedules. The Government also challenges the previously noted six hours which are included in the submittal as a charge for Peter Elliott Accountancy Corp. for review and finalization of the quantum portion of this application after this opinion issues. We have no authority to allow recovery for expenses which may be incurred in the future and have eliminated them from the claim, thereby reducing the 1989-90 Peter Elliott Accountancy Copp. fees from $13,640.70 to $ 18,190.70. We, therefore, conclude that the amounts incurred for accounting services were reasonable

and, in the nature of a jury verdict, allowable in accordance with the percentages allocated for legal services for the similar time frames, as follows:

Gene G. Burnhurst, Accountant	$ 15,160.00 @ 50%	$ 7,580.00
H.K. Grimshaw		
1983	356.00 @ 50%	178.00
1987	275.00 @ 75%	206.25
Peter Elliott Accountancy Corp.		
1983	8,894.00 @ 50%	4,447.00
1984	18,368.03 @ 50%	9,184.02
1985	7,628.15 @ 30%	2,288.45
1986	1,872.75 @ 30%	561.83
1987	12,839.16 @ 75%	9,629.37
1988	22,131.59 @ 75%	16,598.69
1989-90	18,190.70 @ 75%	13,643.03
	TOTAL	$ 64,316.64

Expert Witness Fees and Expenses

In our entitlement opinion on this application we concluded that, pursuant to EAJA 5 U.S.C. § 504(b)(1)(A) and DFARs 37.104-70(1), compensation of expert witnesses could not exceed the highest rate for grade GS-15, which, as of 1987, was $ 33.53 per hour. Applicant argues that this rate should be modified by reducing the number of annual hours in the divisor to 1552 hours (instead of the 2087 used) by elimination of vacation time, holidays, sick leave, and an "efficiency quotient" and then increasing the result for indirect expenses and support. This results in an hourly fee of $ 75, which amount it has used in its revised claim. Applicant

paid its experts, and the Government expert whom it deposed, at varying amounts between $ 100 and $ 150 per hour. The Government argues that the amount should be limited to the $ 33.53 hourly rate cited in our prior opinion.

The relevant portion of the statute provides:

> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses. . . . except that (1) no expert witnesses shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved. . . . [emphasis added]

After issuance of our opinion on entitlement, the Government admitted that it paid the expert it had contracted to use in the oral hearing on the remaining issues and on quantum in these appeals, at an hourly rate in excess of the $ 75 hourly rate included by applicant in its revised claim. (The presumption that the Government's payment of its expert was proper and appropriate has not been rebutted.)* We, therefore, modify our prior opinion and conclude that, pursuant to the statute set forth above, the amount of $ 75 per hour claimed by applicant is allowable since it does not exceed "the highest rate of compensation for expert witnesses paid by the agency involved."

Applying the percentages which we have concluded

---

* The Government was ordered to submit a copy of the contract with its expert or an affidavit indicating the hourly rate paid its expert. It has failed to do so. Appellant paid the expert $100 per hour for his deposition.

should be utilized on the basis of the type of activities involved in the various time frames, we conclude that applicant is entitled to recover for fees and expenses of expert witness as follows:

Pollack & Pollack, Inc.	$ 6,839.02 @ 75%	$ 5,129.27
Magnal Limited	59,840.64 @ 50%	29,920.32
Dole & Associates	900.00 @ 75%	675.00
	TOTAL	$ 35,724.59

Other Expenses

In addition to its claim for reimbursement of expenses incurred in deposing the Government expert (set forth above under "Dole & Associates"), applicant claims $ 84 for Pamela Gerkin. That invoice indicates 7 hours spent for "legal billing analysis." While not specifically challenged by the Government, we do not consider this amount sufficiently identified as to be allowable under this EAJA application.

Summary

In summary, we conclude that allowable attorneys' fees and expenses under this EAJA application are as follows:

Legal Fees	$ 268,134.75
Legal Expenses	66,287.25
Paralegal Expenses	41,261.28
Accounting Expenses	64,316.64
Expert Witness Expenses	35,724.59
TOTAL	$ 475,724.51

Dated: 20 September 1990

/s/_____
RUTH C. BURG
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

I concur

/s/_____
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman, Armed Services
Board of Contract Appeals

/s/_____
V. JOHN RIISMANDEL
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals on an application for fees and other expenses incurred in connection with ASBCA No. 26362, 26383, 26364, 26365, 26366, 26505, 26506, 26513, 26642, 29932, 29933 and 29934, Application of M. Bianchi of California, rendered n accordance with 5 U.S.C.A. § 504.

Dated: 25 Sep 1990

/s/_____
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX J

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)
	)
M. Bianchi of California	)ASBCA No. 36518
	)
Under Contract No.	)
DLA100-80-C-2972	)
	)

APPEARANCE(S) FOR THE APPELLANT: Michael A. Hordell, Esq. Laurel A. Heneghan, Esq. Petrillo & Hordell Washington, DC

APPEARANCE(S) FOR THE GOVERNMENT: Thomas Hornak, Esq. Chief Trial Attorney; Stephanie L. Zimmt-Mack, Esq. Patricia A. Papas, Esq. Trial Attorneys Defense Personnel Support Center (DLA) Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE BURG

The Government accepted a Value Engineering Change Proposal (VECP) submitted by appellant during performance of this contract. The parties were unable to agree either as to the per unit amount which was saved because of the VECP or the number of units to which the savings applied. When the contracting officer failed to issue a decision, appellant filed this appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(3). Appellant seeks

$ 2,1753,807.56 as instant, concurrent and future contract savings and $ 3,997,660.80 as collateral savings, for a total of $ 6,173,468.36.

FINDINGS OF FACT

1. Various findings of fact pertaining to this contract were the subject of a prior opinion of this Board on the motion for partial summary judgment filed in this appeal dated 2 March 1990 (unpublished) and in our opinion in ASBCA Nos. 37029 and 37071, 92-__ BCA ¶ ____, (decided 31 July 1992) and, to the extent to which we consider them relevant, they are adopted herein.

The Contract

2. On 23 June 1980, the Defense Personnel Support Center (DPSC) of Philadelphia, Pennsylvania, Defense Logistics Agency (DLA), awarded appellant Contract No. DLA100-80-C-2972 for the manufacture of 125,240 Man's Black All Weather Coat with removable lining at a unit price of $ 31.92 and a total contract price of $ 3,997,366.40. The coat was to be manufactured in accordance with Limited Purchase Description 12-77A (DES 12-77A), dated 1 November 1978, using patterns dated 21 September 1979 issued by the United States Army Natick Research and Development Laboratory (Natick).

3. DES 12-77A incorporated by reference a federal standard, FED-STD-751 - Stitches, Seams and Stitching. The solicitation incorporated by reference DPSC Form 3540, the DPSC Master Solicitation for Clothing and Textiles. The Master Solicitation included Clause J09, Value Engineering

Incentive, January 1978, which provided (R4, tab 4 at 14-15):

J09 VALUE ENGINEERING INCENTIVE (DPSC 1978 Jan)

(a) Application. This clause applies to a Contractor developed and documented Value Engineering Change Proposal (VECP) which:

(i) requires a change to this contract to implement the VECP, and

(ii) reduces the overall costs to the cognizant Military Department without impairing essential functions or characteristics, provided that it is not based:

(A) solely on a change in deliverable end item quantities, or

(B) a change in R&D end item or test quantities due solely to results of previous testing under this contract, or

(C) solely on a change to the contract type.

(b) Documentation. As a minimum, the following information shall be submitted by the Contractor with each VECP.

(i) a description of the difference between the existing contract requirement and the proposed change, and the comparative advantages and disadvantages of each, justification when a function or characteristic of an item is being altered, and the effect of the change on the performance of the end item;

(ii) an analysis and itemization of the requirements of the contract which must be changed if the VECP is accepted and a recommendation as to how to make each change (e.g., a suggested specification revision);

(iii) a separate detailed cost estimate for both the existing contract requirement and the proposed change to provide an estimate of the reduction in costs, if any, that will result from acceptance of the VECP, taking into account the costs of development and implementation by the Contractor (including any amount attributable to subcontracts in accordance with paragraph (h) below);

(iv) a prediction of any effects the proposed change would have on collateral costs to the Military Department such as Government-furnished property costs, costs of related items, and costs of maintenance and operation.

(v) a statement of the time by which a contract modification accepting the VECP must be issued so as to obtain the maximum cost reduction, noting any effect on the contract completion time of delivery schedule, and

(vi) identification of any previous submission of the VECP, including the dates submitted, the agencies involved, the numbers of the Government contracts involved, and the previous actions by the Government, if known.

(c) Submission. VECPs shall be submitted to the Procuring Contracting Officer (PCO). When the contract is administered by other than the purchasing office, a copy of the VECP shall be submitted simultaneously to the Administrative Contracting Officer (ACO). VECPs shall be

processed expeditiously, however, the Government shall not be liable for any delay in acting upon any VECP submitted pursuant to this clause. The Contractor has the right to withdraw, in whole or in part, any VECP not accepted by the Government within the period specified in the VECP.

(d) Acceptance. The Contracting Officer may accept, in whole or in part, by contract modification either before or within a reasonable time after performance has been completed under this contract any VECP submitted pursuant to this clause. Until a contract modification applies a VECP to this contract, the Contractor shall remain obligated to perform in accordance with the terms of the existing contract. Contract modifications made pursuant to this clause will so state. The decision of the Contracting Officer as to the acceptance of any VECP under this contract (including the decision as to which clause is applicable to the proposal if this contract contains both a "Value Engineering Incentive" and a "Value Engineering Program Requirement" clause) shall be final and shall not be subject to the "Disputes" clause of this contract.

(e) Sharing. If a VECP submitted by the Contractor pursuant to this clause is accepted, the Contractor shall share in savings realized by the Government in accordance with the following provisions:

(1) Instant Contract.

(i) Definitions:

(A) Instant contract savings to the Contractor (ICS) is the unit cost reduction times the number of units affected in the instant contract. The proposed unit cost reduction includes estimated allowable Contractor

development and implementation costs (CC). The Contractor's development and implementation costs include any subcontractor development and implementation costs and subcontractor incentive payments (see (h) below). For purposes of this clause, Contractor development costs are those costs incurred after the Contractor has identified a specific VE project and prior to acceptance by the Government.

(B) Government Costs (GC) are those DOD costs which directly result from development and implementation of the VECP, such as test and evaluation of the VECP, and any increased cost in DoD operations, maintenance, and logistics support.

* * *

(2) Concurrent Contracts.

(i) If the VECP accepted under this contract is also used on concurrent contracts of the purchasing office for essentially the same items, the Contractor shall be paid a share of any savings as calculated in (ii) below.

(ii) Calculations

(A) Determine the reduction in the price of each concurrent contract(s) as a result of incorporating the VECP.

(B) Subtract from the total amount in (A) any Government costs (GC) not yet offset (if GC was greater than ICS) in (e) (1) (ii) (C) or (D) above, and any

increase in the instant contract price, i.e., if ICS was negative in (e) (1) (ii) (D), if the resulting number is positive, multiply it by 50% (25% if this is a VEPRC). Add this amount to the instant contract price.

(3) Future Contracts.

(i) Definition. The term unit cost reduction for future contract sharing shall be the unit cost reduction under this instant contract without deducting any cost of development or impletion [sic].

(ii) If the VECP accepted under this contract is used on future purchases of essentially the same item by the purchasing office, or its successor, the Contractor shall share in the savings on all affected end items scheduled for delivery not later than 3 years after acceptance of the first item incorporating the VECP, or until the originally scheduled delivery date of the last affected end item under the instant contract, whichever is later. When sharing on future contracts is expected, the Contractor shall be responsible for the following:

(A) Maintaining records adequate to support identification of the first delivered unit to which the VECP applies. These records are considered an integral part of contract documentation and shall be maintained for a period of three years after final payment on the contract under which the VECP was accepted.

(B) Annotating the DD-250, Material Inspection and Receiving Report, which applies to the initial unit covered by the VECP with the following statement:

"This is the initial unit delivered which incorporates VECP NO. _____, Contract Modification No. _____, dated _____."

(iii) Calculations. At the time each eligible future contract is awarded:

(A) Determine the number of units scheduled to be delivered prior to expiration of the Contractor sharing period determined in (ii) above. Multiply this by the unit cost reduction as defined in (e) (3) (i).

(B) Subtract from the total amount in (A) any Government costs or instant contract increases not yet offset in (e) (1) (ii) (C) or (D), or in (e) (2) (ii) (B), or in other contracts awarded since acceptance of the VECP. If the resulting number is positive multiply it by 50% (25% if this is a VEPRC) and add the result to the instant contract price.

(f) Payment. The Contractor's concurrent and future contract shares should be paid upon modification of concurrent contracts or future contract award, or within six (6) months thereafter. However, any such payments are subject to the condition that to the extent the Government does not receive delivery of and accept all items on which the share is paid, the Contractor shall reimburse the Government the proportionate share of the payments. If this clause is modified to provide for lump sum payments, such payments shall be made upon modification of the instant contract.

4. On 24 June 1980, DES 12-77A was superseded by MIL-C-44030(GL) for Coat, All Weather, Man's Black, w/Removable Liner. The requirements of DES 12-77A were

incorporated into this new specification. Appellant's contract was not required to be modified and was not modified to include MIL-C-44030 and continued to require production in accordance with the requirements of DES 12-77A.

The VECP Approval

5. On 9 September 1980, appellant submitted a VECP to modify DES 12-77A, which stated:

> Value Engineering Proposal Change recommendation to delete Operation 22C "Stitch sleeve lining to sleeve 1 inch from bottom of overedge seam of lining."
>
> Value Engineering Proposal Change recommendation; change 15-D from "Overedge stitch bottom rawedge [sic] of sleeve lining."
>
> Change to: Safety stitch sleeve lining to sleeve catching interlining.
>
> Result in Savings: 6 ¢ per coat.
>
> Changing this operation will not affect servability [sic] or appearance in any way.

(R4, tab 6)

6. By letter dated 18 September 1980, the contracting officer replied to appellant's letter as follows:

> This is to acknowledge receipt of your Value Engineering Change proposal dated 9 September 1980 submitted under contract DLA100-80-C-2972 for Raincoat, Man's, Black, LP/P DES 12-77A. Your proposal, hereinafter identified as VECP 8680, recommends overedging the bottom raw edge of the sleeve lining.
>
> To permit a proper and complete evaluation of your proposal we will require a separate detailed cost estimate for both the existing contract requirement and the proposed change to provide an estimate of the reduction in costs that will result from acceptance of your Value Engineering Change Proposal. The Value Engineering Incentive Clause (J09), copy attached, in your contract requires this information to be furnished by the proposer. This cost breakdown should also include indirect costs and percentages applied to direct labor and material costs. We request you furnish this information as soon as possible.
>
> We will promptly notify you of the results after completion of the evaluation. Your interest and participation in the Value Engineering Program is much appreciated.

(R4, tab 7)

7. Following a preliminary evaluation, the VECP was forwarded to Natick on 2 October 1980 for a decision of

whether to approve this proposed change. The letter transmitting the VECP was as follows:

> SUBJECT: Value Engineering Change Proposal 8680, Raincoat, Man's Black, w/Removable Liner, LP/P DES 12-77A
>
> * * *
>
> 1. Attached is subject VECP from M. Bianchi of California proposing a change in construction of the sleeve on subject raincoat.
>
> 2. Our technical personnel have reviewed the proposal and believe the recommendation to combine two operations in one by using a safety stitch machine in overedging the bottom raw edge and stitching the lining to sleeve catching the interlining has merit. There is the possibility that the sleeve lining may finish slightly longer, however, the lining is required to be tacked to the outer sleeve and serviceability will not be affected.
>
> 3. Contractor's estimated unit savings of $ .06 projected over the number of raincoats to be procured in FY 81 would result in annual savings of $ 41,459.
>
> 4. We request the proposal be evaluated and we be apprised of your decision by 21 October 1980.

(R4, tab 17)

8. On 15 October 1980, appellant responded to the contracting officer's 18 September 1980 letter and submitted the following information:

> VECP #8680 recommends overedging the bottom raw edge of the sleeve lining by reference (A).
>
> In evaluating the cost savings for the above subject VECP, the direct labor is as stated 6 ¢ per coat. We can only estimate 2 ¢ for indirect cost and 2 ¢ as a percentage to apply to direct labor and material cost. Total savings to the government of 10 ¢ (By reference B).

(R4, tab 8)

9. On 25 November 1980, Natick informed DPSC that VECP 8680 had been approved for use in DES 12-77A and its follow-on specification, MIL-C-44030(GL), both of which contained the same description for operations labelled 15d and 22d. Natick authorized changing both DES 12-77A and MIL-C-44030 as follows:

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> Operation 15d. - Delete in its entirety and substitute:
>
> "15d. Safety stitch bottom raw edge of sleeve lining to bottom of sleeve, catching interlining with not less than 3/8 inch seam.

Stitch Type	Seam and Stitching Type
515, 516 or 519	Ssa-2

* * *

Operations 22c - Delete Operation 22c and Re-Letter Operation 22d to 22c.

(R4, tab 17)

10. By letter dated 29 December 1980, the acting Chairman of the Clothing and Textile Branch, Technical and Quality Assurance Division of the Directorate of Clothing and Textiles sent an Inter-Office Memorandum listing five items to which VECP 8680 "can be made applicable." They were:

Coat, All Weather, Mn's	MIL-C-44030
Coat, All Weather, Wmn's	MIL-C-43972
Coat, All Weather, Mn's (CG)	MIL-R-87003
Coat, All Weather, Wmn's (CG)	MIL-R-87009
Coat, All Weather, Mn's (AF)	MIL-R-87110

(R4, tab 19) The record contains no indication that, other than MIL-C-44030, any of the above-listed specifications were changed. At that time, DPSC did not have authority to change specifications. It made recommendations to various service offices responsible for issuance of specifications which then made the determination whether to make such changes. It often took a long time to incorporate various changes into a clothing specification. Items which were acquired frequently and/or in large quantities received more immediate

attention. Prior to a specification change, a letter directive was issued modifying the specification to reflect the change or changes for a particular item. At Natick, an individual was assigned specific items which were not necessarily related either by use or type. It was that individual's responsibility to revise specifications once a value engineering change had been approved. There was no procedure whereby all other personnel were notified of a specific change for which another individual was responsible although it was possible they might learn about the change.

11. By Inter-Office Memorandum dated 30 December 1980, the Chief of the Technical and Quality Assurance Division of the Directorate of Clothing and Textiles requested that the following contracts be modified to incorporate VECP 8680:

Centre Mfg.	DLA100-80-C-2485
Centre Mfg.	DLA100-81-C-2225
Centre Mfg.	DLA100-80-C-2782
Centre Mfg.	DLA100-80-C-3401
Major Coat	DLA100-80-C-2472
MBOC	DLA100-80-C-2972

12. On 29 January 1981, Natick informed DPSC that findings from a follow-up evaluation of VECP 8680 indicated that a line tack in the lining of the sleeve should be added as an additional operation to MIL-C-44030(GL) and DES 12-77A to take-up the excess lining fabric. The Government considers that the line tack was an outgrowth of and resulted from VECP 8680. Appellant does not concur that this tack was required as a result of VECP 8680.

13. By letter dated 10 March 1981, the Chief of the Product Engineering Office, Directorate of Manufacturing, concluded the following:

> 1. Reference IOM, your Office, dated 19 February 1981, subject as above.
>
> 2. A direct labor savings of .0071 standard hours will be realized when sleeve lining is joined to sleeve with a safety stitch in lieu of overlock and single needle stitching.
>
> 3. Overhead and profit are not included in the above figure.

Handwritten on the document is the following:

> 0.0071 X $ 4.75/hour = 0.033725
> + 80% overhead = 0.060705
> + 20% G & A = 0.073 per unit

(R4, tab 12) While when or by whom the above calculation was made and placed on the letter has not been established in the record before us, it was apparently by someone in the Government prior to recommending an amount for finalized savings to the contracting officer. (See F/F 14)

14. On 20 March 1981, the Value Engineering Office of the Directorate of Clothing and Textiles recommended to the contracting officer that the savings be finalized at $ .07 per unit, with appellant eligible for a 50% share of the savings, or $ 0.035 per unit.

15. On 31 March 1981 the contracting officer notified appellant that VECP 8680 had been accepted at a unit price yet to be established and that the contract would soon be modified. Unilateral Modification P00005, effective 31 March 1981, made no change in the contract price but provided, insofar as VECP 8680 was concerned:

> 1. Pursuant to the Changes Article and Value Engineering Clause J09, Specification MIL-C-44030 [DES 12.77A rather than the cited MIL specification was applicable to this contract] is changed as follows as a result of VECP #8680:
>
> a. Delete operation 15.d, "overedge the bottom raw edge of the sleeve lining".
>
> b. Change operation 22.c to read: "Safety stitch bottom sleeve lining to sleeve lining to sleeve bottom catching interlining". [This is actually a paraphrase of the revised operation 15d. Operation 22c was eliminated. See Finding 9, supra]
>
> 2. As a result of the above accepted VECP, the CMT unit contract price of all units subsequent to and including the initial unit covered by the VECP is to be reduced by $ .035 for payment purposes to reflect the Government's share of the savings.
>
> 3. Contractor is entitled to 50% of the unit savings or $ .035 for all Coat, All Weather,, [sic] Man's, Black w/removable liner using the accepted change #8680 during the royalty period. The royalty period shall extend for a period of 3 years after acceptance [sic] of

the first item incorporating the VECP.

4. Contractor is obligated to annotate the DD Form 250 which applies to the initial unit covered by the VECP #8680.

(R4, tab 2 at 15)

16. The initial unit manufactured under Contract 2972, as modified by VECP 8680, was delivered to and accepted by the Government on 6 April 1981. The applicable royalty period for VECP 8680, therefore, is 6 April 1981 through 5 April 1984. The contract payments to appellant for the instant contract were never adjusted to reflect savings attributable to VECP 8680.

17. By Modification P00007, dated 16 November 1981, the undelivered quantity of 87,094 units remaining on Contract 2972 was terminated for default.

VECP 8680

18. All stitches and seams used in construction of Government clothing are described in FED-STD-571 (January 25, 1965). Each type of stitch or seam is assigned a number. The stitches and seams used both before and after approval of VECP 8680 existed in FED-STD-571. Prior to incorporation of the change due to VECP 8680, DES 12-77A Operation 15d required seam and stitching type EFd-1 with a choice of 502, 503 or 504 stitch type. Operation 22c required seam and stitching type SSa-1 with a 301 stitch type. After the change resulting from VECP 8680, one operation replaced these two operations. Operation 22c was deleted in its entirety and

Operation 15d was changed to require seam and stitching type SSa-2 with a choice of 515, 516 or 519 stitch type (F/F 9, supra).

19. A safety stitch is a term used to describe a family of stitches composed of rows of single needle joining stitches and rows of overedging stitches, formed simultaneously with one pass through a sewing machine. The combination of the joining and overedging operations results in a change in the seam type to a less complex and more cost effective seam. Stitches 515 through 519 are all in the family of safety stitches. They vary depending on the types of single needle stitch and the type of overedge stitch utilized. Stitch types 502, 503 and 504 originally contained in DES-12-77A are overedge stitches. Seam type EFd-1 refers to the type of stitching produced by overedging the cut edge of one ply of fabric. Operation 22c required stitching of the sleeve lining to the shell sleeve one inch from the bottom of the overedged seam of lining using stitch type 301, a single needle stitch performed on a lock stitch, and seam type SSa-1. SSa-1 is the most frequently used seam type and is accomplished by laying two plies of fabric together and joining the plies a specified distance from their common cut edge with the single needle 301 stitch.

20. Prior to submittal of VECP 8680, DES 12-77A required the use of safety stitches in eight other operations during production of the All Weather coat which was the subject of that purchase description. These were:

15. Make lining (yoke).

a. Join front lining to front sleeve

lining at armhole with a safety stitch. (Stitch type 515, 516 or 519; seam and stitching type SSa-2).

b. Position front edge of back sleeve lining and front edge of cape to shoulder edge of front lining and safety stitch with stitching continued the entire length of sleeve (Stitch type 515, 516 or 519; seam and stitching type SSa-2).

c. Position back edge of cape and back edge of back sleeve lining to front edge of back lining and safety stitch to bottom of armhole. (Stitch type 515, 516 or 519; seam and stitching type SSa-2).

[d. Overedge stitch bottom raw edge of sleeve lining using Stitch type 502, 503 or 504 and seam EFd-1, prior to the change due to VECP 8680. See F/F 9 for incorporation of VECP 8680 using Stitch type 515, 516 or 519 and seam and stitching type SSa-2]

e. Close side seam of front and back lining and underarm seam of sleeve in one operation with a safety stitch. (Stitch type 515, 516 or 519; seam and stitching type SSa-2).

* * *

MAKE LINER

35. Attach front sleeve of liner to front of liner.

a. Position front sleeve to front of liner as indicated by marks on pattern and safety stitch around armhole. (Stitch type 515, 516 or 519; seam and stitching type SSa-2).

b. Position front edge of back sleeve to shoulder edge of front of liner and safety stitch with stitching continued the entire length of sleeve. (Stitch type 515, 516 or 519; seam and stitching type SSa-2).

c. Position back edge of back sleeve to front edge of back liner and safety stitch to bottom armhole. (Stitch type 515, 516 or 519; seam and stitching type SSa-2).

d. Close side seams of front and back of liner and underarm seam of sleeve in one operation with a safety stitch. . . . (Stitch type 515, 516 or 519; seam and stitching type SSa-2).

[Emphasis added] (R4, tab 5 at 19, 28-29)

The Claim

21. Appellant was not in agreement with the Government's calculated savings of $ 0.07 per unit and did not sign Modification P00005. No payments for VECP 8680 have ever been made to appellant. On 16 November 1987 appellant submitted a certified claim, received on 17 November 1987, for payment of its share of savings. No decision was issued by the contracting officer. When the contracting officer failed to respond to another request for a decision, appellant filed an appeal with this Board.

22. In its complaint, appellant contended that the savings as verified by the Government when it approved VECP 8680 did not include savings for indirect costs, contractor and Government furnished material or profit and alleged that the properly calculated savings for VECP 8680 were $ 0.164 per coat so that its share was $ .082 per coat. Appellant, therefore, sought a royalty of "at least $ 63,502.52" for the instant contract and five other contracts because of utilization of VECP 8680 on "at least 774,421" units. Appellant further alleged on information and belief that the Government experienced collateral savings and savings on additional contracts about which it was not currently aware at the time of filing its complaint and that it would "amend its claim as further information concerning the government's use of this VECP becomes known." (Complaint, Para. 9-12)

23. Appellant's president reviewed 2,223 specifications utilized in the manufacture of military garments to determine those which were modified after VECP-8680 and which he concluded were the "mirror image" or were the "functional equivalent" of VECP 8680. Where no explanation

or basis for the change was found for twenty specifications, he concluded that the change was because of VECP 8680. These specifications form the basis for appellant's claim for concurrent and future savings.* On 15 February 1991 appellant supplied the Government with a list of those specifications for which it was claiming a share of savings. Appellant recognizes that it did not invent the safety stitch or introduce its use into Government specifications and seeks a share of savings for the Government's use of the safety stitch on garment locations where the safety stitch was not being used at the time of approval of VECP 8680. Based on calculations, discussed below, appellant alleges that it should receive instant and future contract savings from implementation of VECP 8680 of $ 2,175,807.56 for essentially the same item and $ 3,997,660.80 for collateral savings. Appellant also seeks interest. The Government

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* Initially appellant included 21 specifications in its claim. Upon obtaining additional information from the Government, which was the sole party with appropriate information, appellant refined its claim to the 20 specifications included in its brief. Appellant supplied the Government with a list of the specifications on 15 February 1991. On the first day of the hearing, the Government offered Exhibits 28-38, Limited Purchase Descriptions issued prior to VECP incorporating certain changes which were included in subsequent specifications upon which appellant relied for eleven of the specifications included in its claim. They were received in evidence over appellant's objection. On 6 September 1991, appellant filed a written Motion to Strike these exhibits as hearsay based on the Government's failure to authenticate or identify these documents pursuant to the Federal Rules of Evidence, or, in the alternative, a Motion for the Imposition of Discovery Sanctions to preclude for failure to acknowledge the existence of this information or produce it during discovery despite repeated discovery requests for such information.

agrees that appellant is entitled to receive interest from 16 November 1987, but not prior to that date.[**]

24. The specifications which appellant includes in its present claim are set forth below. A brief description of the operation(s) which appellant claims were due to its VECP is set forth under each item. Included are instances where a specification was issued using the safety stitch operation or was changed so that two operations were combined into one operation. Also included are instances where a lapped seam was required since appellant argues that a lapped type seam is functionally equivalent to the overedging operation described in VECP 8680. The lapped seam (LSC-2) is formed by folding an inside ply of material into an outside ply of material and then sewing the folds together, involving the combination of two operations -- joining and edge protection.

MILSPEC	ITEM	½ UNIT SAVINGS	TOTAL NO. UNITS	TOTAL CONTR. SAVINGS
S-44093	Shirt, Woman's, Long Sleeve Polyester/Cotton Make sleeve; join front to side body; join shoulder seams	$0.149	425,033	$ 63,331

[**] We recognize that the Government, in its response to appellant's proposed Finding 332, indicated that it did not dispute interest from 16 February 1987. However, we conclude that this was a typographical error, since that date is unrelated to any dates involved in this appeal and other parts of the Government's reply brief (including in its conclusion at page 88).

	and back to front; set sleeves			
S-44102	Skirt, Woman's Classic Design Polyester/Wool Make pocket and attach label; attach pocket	0.033	84,417	2,786
S-44090	Shirt, Woman's Short Sleeve, Polyester/Cotton Make sleeve underseam; join front to side body; join shoulder seams and back to side body; set sleeves	0.149	926,028	137,978
S-44092	Slacks, Woman's Classic Design, Polyester/Wool Make pocket and attach label	0.033	256,648	8,469
S-44039	Shirt, Man's, Long Sleeve, Polyester/Cotton Set sleeve to armhole; join side and underarm seams	0.071	2,848,840	292,268
S-87169	Shirt, Woman's, Utility Set sleeves; join side seams and sleeve seams	0.063	142,326	8,967

L-44089	Liner, Night, Camouflage Parka, Desert Join liner (Lap seam)	0.101	260,023	26,262
T-44047	Trousers, Combat Woodland Camouflage Make hip pockets; make and stitch side hanging pockets	01.36	11,914,174	1,1620,328
J-87024	Jacket, Insect Repellent Amended spec 5/4/84 to Permit alternate of Using safety stitch to Attach interlining and Sleeve	0.028	104,431	2,924
S-44041	Man's Short Sleeve Shirt Set sleeves; join side and underarm seams	0.054	3,032,422	163,752
C-87093	Coverall, Man's, Fire Retardant Join back arm seam; Set sleeve; stitch crotch seam	0.110	163,260	17,959
P-6279J	Parka, Extreme Cold Weather, Type N-3B Join sleeve linings	.0.085	227,863	19,368

S-29368A	Shirt, Woman's 0.027 Long/Short Sleeve, Polyester/Cotton Changed operation from: Make bust and front darts; to: Assemble front and side panels (Alternate operation)	108,408	2,927
S-87005A	Skirt, Woman's, 0.014 Dress Added alternate zipper attachment with safety stitch	1,435	20
			TOTAL NO. UNITS
0-44109	Overall, Combat Vehicle Crewman's Series of seams using safety stitch and lap seam; Make leg cuff-slide fastening openings; make front pockets openings, attach pockets; make thigh and shin pleats and close pockets		10,383
S-83234B	Skirt, Woman's Blue Make pockets		154,284
S-0037951	Smock, Medical Assistant's, Man ' s Join Shoulder seams;		55,512

	make and set sleeves; join side and underarm seams	
S-3649E	Shirt, Man's Tropical, Polyester/Wool Set sleeves; close sides and sleeves	1,440,407
S-44110	Slacks, Woman's Maternity Work Uniform Join stretch panel	153,640

25. Each of the above-listed specifications reflected a specification modification from two operations prior to the submittal of VECP 8680 to one operation or a new specification using a safety stitch machine with stitch type 515, 516, 517 or 519 and, in most instances, seam type SSa-2. A few operations required a lap seam or seam SSa-1 rather than the SSa-2. In some instances the safety stitch operation was an alternate method of construction rather than a mandatory method. If a bidder has both types of equipment or can afford the equipment necessary for using the safety stitch, the manufacturer will prepare an estimate using each method and select the least expensive in order to be competitive.

26. Appellant was unable to obtain sufficient information during discovery relating to delivery schedules and number of units procured for some of the specifications included in its claim (the last five items set forth in Finding 24). It, therefore, estimated the number of units procured during the royalty period from information for a later period provided by Government procurement centers (such as DLA)

to a company named Information Handling Systems and compiled into a database called "Haystack". Using the information contained in Haystack for the years 1983 to 1991, appellant calculated an average for each year and then used this average (multiplied by three) to estimate the number of units for each of the five items included in the "Total No. Units" column listed above with no dollar figure listed under "Total Contract Savings" (F/F 24). Appellant seeks the product of the amount we conclude appellant should receive per unit for those items multiplied by the number of estimated units. Appellant had included one other specification (making the 20 total - F/F 23) in its claim for future savings, MIL-C-87170. Since it was unable to obtain any information through either discovery or its own sources upon which it could base an estimate of units obtained during the royalty period, in its brief appellant stated it was not claiming any savings from that specification.

Quantification of the Contract Savings

27. A consultant to the apparel industries appeared for appellant. He calculated savings on direct labor and material for Contract 2972 by estimating the manufacturing time and material required for all operations prior to and after approval of VECP 8680. The difference represented the direct labor and material saved for each unit.

28. Using a sophisticated system of time/motion studies and a data base of production standards (expressed in Standard Allowed Minutes per piece) for similar types of garments, he calculated the Standard Allowed Minutes (SAM) savings to be 0.734, as follows:

No.	Description	SAM
15d	Overedge bottom of sleeve lining	0.697
22c	Set Sleeve lining to sleeve	1.271
	Original Total Standard Minutes (SAM)	1.968
15d	Combining operations per VECP 8680	1.234
	Savings	0.734

(Exh. 1073 at 19)

29. To calculate the Total Direct Labor Minutes Saved, appellant's expert added the Associated Direct Labor Factor and the Support Direct Labor Factor to the 0.734 SAM. He used 20 percent, based on experience with similar shops, to compute the Associated Direct Labor Factor. This included training of direct labor, repairs, relocation of direct labor personnel to balance the production line and machine downtime. He used 15 percent, based on experience with similar shops, to compute the Support Direct Labor Factor which included the direct supervisors, bundle girls, mechanics and quality assurance personnel. This was calculated as follows:

Net Standard Minutes Saved	0.734
Associated Direct Labor Factor (20%)	0.147
Subtotal	0.881
Support Direct Labor Factor (15%)	0.132

Total Direct Labor Minutes Saved 1.013

(Exh. 1073, p. 20)

30. After calculating the labor savings because of VECP 8680, appellant's expert estimated the amount of fabric, lining and interlining which in his opinion should have been saved as a result of the VECP. Operation 22c had required a seam allowance of 1 inch. When this operation was eliminated by VECP 8680, a pattern change to eliminate excess material and reduce the seam allowance to 3/8 inch was possible. This would have resulted in a savings of 5/8 inches for the Government furnished fabric, the lining and the interlining.

31. VECP 8680 did not include a suggestion that the lining be shortened, thereby saving fabric. In its submittal of estimated savings submitted on 15 October 1980, appellant estimated a savings for direct labor but none for material (F/F 8). Nor was there a change in the patterns to shorten the lining. Revision of Government patterns is a complicated matter and is not the responsibility of nor performed by DPSC. The cognizant Government office did not elect to change the patterns and testimony at the hearing by an individual who was not involved with approval of VECP 8680 by Natick nor with the requirement of addition of the line tack (see F/F 12) was that this was so that there would be sufficient material so that if the sleeve had to be lengthened for the user there would be sufficient lining material. This same witness had drafted an all weather coat specification in 1977 which used an operation similar to that suggested by VECP 8680. However, it did not require the lining to be tacked to the sleeve shell. There was also testimony that the

lining could have been left alone completely, "not putting any bar tack at all, leave it loose" (tr. 6-134). We conclude that the record fails to persuade us that the addition of the line tack was necessary because of VECP 8680.

32. Appellant's expert used what is termed the "square inch method" to calculate the total material which he concluded could have been saved as a result of VECP 8680, as follows:

Part	Sq.Inch/ Sleeve	Saved Per Garment
GFM (Back and front sleeve material)	10.313	20.626
Lining (Back and front sleeve)	10.131	20.626
Nonwoven Interlining	9.844	19.688

(Exh. 1073, p. 21)

33. Appellant's expert accounting witness quantified the claim using the savings in labor and material set forth above. He concluded that it would be appropriate to factor in an escalation rate for labor and material costs for the three-year period during which appellant was entitled to share in instant and future contract savings because it was a time when both were rising. Using Labor Force Employment and Earnings statistics for Apparel and Other Textile Products published by the U.S. Department of Commerce, Bureau of Economic Analysis, in the Survey of Current Business, he

calculated a labor escalation of $ 0.333. He used the mid-point of appellant's performance under this contract, December 1980 as the starting point and the midpoint of the three year period, October 1982, as the date for the average labor rate for the three-year period. Adding the escalation rate to appellant's average labor rate of $ 4.00 during performance of this contract, he made the following computation:

Contractor Labor Rate/Hour for Contract 2972 [Based on a DCAA Audit report which took no exception to average incurred contract direct labor rate of $ 4.00 per hour submitted by appellant]	$ 4.000
Rate Escalation	0.333
Escalated Contractor Labor Rate/Hour	$ 4.333
Labor Rate/Minute ($ 0.072/60)	$ 0.072
Total Direct Labor Minutes Saved [F/F 29]	1.013
Total Direct Labor Savings per Garment	$ 0.073
Indirect Expense Savings per Garment at 47.94% [Based on DCAA recommended forward pricing rate]	$ 0.035

34. Appellant's accounting expert also calculated the dollars applicable to material savings. Using the Producer Price Index for Textile Products and Apparel published by the U.S. Department of Commerce, Bureau of Economic Analysis, in the Survey of Current Business, he estimated an

escalation for fabric furnished by both the contractor and Government based on a midpoint of performance of the royalty period of October 1982. Applying these escalated fabric costs to the estimated square inch savings/sleeve (F/F 31), he estimated savings for contractor supplied fabric (lining and interlining) of $ 0.026 per garment and Government furnished material savings of $ 0.038 per garment (exh. 1029 at 3-6, 8-9).

35. Appellant used 47.94 percent as its indirect expense rate. This was the recommended Defense Contract Audit Agency (DCAA) rate for appellant's calendar year 1980. While the overhead experienced by appellant during 1981 was higher than this due to problems encountered by appellant and its cessation of operations during 1981, in developing the unit savings, because of lack of historical data, appellant made no increase in this rate. The Government used 80 percent for overhead and 20 percent for G&A, a total of 100 percent (F/F 13). The 1980 indirect expense rate was lower than that experienced by appellant in 1981. No audit was performed by the Government for 1981. We conclude that the rate used by the contracting officer in her unilateral determination of the instant contract savings is the appropriate rate to use in determining instant contract savings.

36. Appellant included a profit factor of 11.9 percent in estimating its price for this contract. In estimating the amount of savings for VECP 8680, appellant calculated profit on its costs, excluding GFM, at this 11.9 percent. ASPR 1-1703.1 (d), in effect at the time of award of the subject contract, provided:

> On instant and future contracts the contractor's profit

or fee shall be excluded when calculating the net savings.

37. Summarizing the various savings, appellant's accounting expert calculated that the savings were as follows:

Contractor Furnished Materials Savings	$ 0.026
Direct Labor Savings	0.073
Indirect Expense Savings	0.035
Other Direct Cost Savings	0.000
Subtotal	$ 0.134
Profit	0.016
Government Furnished Material Savings	$ 0.038
Total Savings/Garment	$ 0.188
Contractor Assigned Savings (50%)	$ 0.094

38. The contractor assigned savings of $ 0.094 was multiplied by 837,329 units estimated as delivered during the royalty period to claim a total savings for items obtained using MIL-C-44030 of $ 78,709. Appellant used the services of a consultant to determine the quantity of units delivered under the instant contract and other contracts using MIL-C-44030 for which it concludes that the VECP was made applicable. The consultant reviewed contract procurement history records from Government records obtained during discovery and information from a commercially available database known as "Haystack" (see F/F 26). Neither of these sources had complete information but by combining them and making certain assumptions based on available information as to

delivery schedules, he reached the following conclusions about deliveries of the Man's All Weather Coat w/Removable Liner produced using MIL-C-44030 or DES 12.77A (exh. 1041, p. 1):

Cont.No. DLA100-	Manufacturing Name	Award Date	Quantity	Qty in Royalty
80-C-2485	Centre Mfg Co.	Jan-80	125,840	0
80-C-2972	M Bianchi of California	Jun-80	125,240	22,000
81-C-2227	Major Coat Co.	Oct-80	58,976	28,976
81-C-2773	Centre Mfg Co.	Feb-81	91,176	91,176
81-C-2773*	Centre Mfg Co.	Feb-81	91,184	91,184
81-C-3451	Centre Mfg Co.	Sep-81	156,776	156,776
81-C-3451*	Centre Mfg Co.	Sep-81	78,384	78,384
82-C-0562	Centre Mfg Co.	May 82	218,591	218,591
83-C-0649	Centre Mfg Co.	May-83	123,858	123,858
84-C-0285	Centre Mfg Co.	Dec-83	174,028	26,384
	TOTALS		1,244,053	837,329

* Option quantities

The record contains no information concerning utilization of VECP 8680 in contracts other than DLA100-80-C-2485 for which modifications were suggested by the Chief of the Technical and Quality Assurance Division of the Directorate of Clothing and Textiles because of VECP 8680 (F/F 11).

39. In developing this appeal, appellant was at a disadvantage since, other than information available through sources such as Haystack, all of the information it needed was

in the possession of the Government.[***] The Government now argues that the above information concerning concurrent contracts fails to reflect items which were rejected or variations (decreases) delivered in quantities permitted under the contracts. We conclude that under the circumstances the information in the record, summarized above, presents a fair basis for determining the quantity of similar coats delivered during the royalty period.

40. Under the J09, Value Engineering Incentive clause paragraph (e)(2) (F/F 3), savings attributable to concurrent contracts are determined using the reduction in price of each concurrent contract. VECP 8680 was a mandatory change which was incorporated into the concurrent and future contracts using MIL-C-44030(GL). At the same time that VECP 8680 was added to the contracts, the line tack was also added. The prices negotiated with Centre and Major on their contracts combined those two changes. That resulted in an increase, rather than a decrease, in contract price so that the Government's position is that there were no concurrent or future savings for the contracts, other than appellant's, listed above in F/F 38. We have concluded in F/F 31 that this record has failed to establish that the addition of the line tack

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[***] During preparation of its appeal appellant had great difficulty in obtaining information concerning other Government contracts and information which was solely in the Government's possession. There were numerous motions to compel directed to a former Government counsel assigned to this appeal and, ultimately, severe sanctions were imposed because of failure to comply with Board orders concerning discovery. Present counsel were very cooperative and should in no way be tarred by action of prior counsel.

was required by VECP 8680. We, therefore, conclude that the per unit saving we determine is applicable to the instant contract is a reasonable per unit savings for the contracts under which the same garment was manufactured during the savings period.

41. Paragraph (e)(3)(iii) of the Value Engineering Incentive clause (F/F 3) permits the Government to reduce the future contract savings for certain stated reasons. Based on concerns that the Government might argue that it was not entitled to the amount determined for instant contract savings on future items, appellant "reengineered" the items included in its claim for future contract savings. The same detailed and extensive method was used for determining the instant contract unit savings and the reengineered unit savings for each contract for which appellant seeks inclusion in savings resulting from VECP 8680. The reengineered per unit savings for which appellant concluded it had sufficient information to make the computation are set forth in F/F 24. Appellant seeks recovery for the last five specifications at the amount we conclude it is entitled to receive for instant contract savings because of its inability to "reengineer" savings for those specifications. Whether instant contract savings or recalculated savings for a future contract are used in determining quantum is a matter left to us for decision in this appeal.

42. The Government does not challenge the methodology used by appellant in its calculations. Its objections essentially challenge whether appellant is entitled to recover for savings resulting from the inclusion of the safety stitch in other specifications as future savings under this contract (which issue will be discussed, infra) and

quantification of some of the items.

43. The Value Engineering Incentive clause in appellant's contract did not provide for collateral savings. The standard Armed Services Procurement Regulation (ASPR) clause contained a provision for collateral savings, such as savings relating to handling of materials, storage of particular goods, shipment of particular goods, etc., with a maximum of $ 100,000 or the price of the contract on which the VECP is submitted, whichever is greater. Since appellant was unable to obtain any information during discovery which it could use in determining collateral savings to the Government from VECP 8680, it seeks its contract price of $ 3,997,366.40 (F/F 2) as collateral savings from approval of this VECP.

44. ASPR 1-1703.2 (1 July 1976), in effect at the time of award of the subject contract, entitled "Collateral Savings" provides that the Collateral Savings clause "may be excluded from a contract or class of contracts when the HPA [Head of the Procuring Activity] determines that the cost of computing and tracking collateral savings will exceed benefits to be derived." In accordance with the foregoing, the DPSC Contracting Manual instructs the Clothing and Textile Directorate to exclude the collateral savings provision from the Value Engineering Incentive clause because the head of the activity had determined that the cost of tracking collateral savings would exceed the benefits to be derived from acceptance of a VECP, and the collateral savings provision was therefore omitted from the contract (tr. 5/39, 80). The standard Value Engineering Incentive clause, supra, contains, at subparagraph (e)(4) the provision concerning Collateral Savings and includes the provision that

> . . . The determination of the amount of collateral savings, if any, will be made solely by the Government and not be subject to the "Disputes" clause of this contract.

DECISION

Jurisdictional Issue

In its posthearing brief, the Government argues that the Board lacks jurisdiction to consider appellant's claim for those specifications which appellant alleges were revised because of VECP 8680 other than the specification for the all weather coat since that portion of the claim based on those specifications (F/F 24) was never submitted to the contracting officer for final decision. While a motion to dismiss for lack of jurisdiction based on a similar argument was denied in our opinion in ASBCA Nos. 37029 and 37071, supra, we reiterate our conclusion that appellant's claim contained all the information available to it at the time of filing and that the enlargement of its claim is the result of information obtained during discovery from information unavailable until supplied by the Government. The increase in dollars did not result from new claims, new legal theories, or new factual bases for recovery. While the Government's argument and request that these additional specifications be remanded to the contracting officer was not captioned as a motion to dismiss, we consider it such and deny the motion.

Essentially the Same Item

The major dispute, which has permeated this appeal throughout, is the question of what constitutes "essentially the

same item." It is of utmost importance in this appeal since it determines the number of units to which a relatively small per unit savings (09.4¢ according to appellant, 03.2¢ according to the Government) will apply and establish appellant's share of contract savings because of acceptance of VECP 8680. It has clouded all efforts to resolve this dispute by settlement, and was the subject of our earlier opinion on the Motion for Partial Summary Judgment where we concluded that this question was a factual one which must be determined taking into consideration the VECP involved and the items involved in the particular claim. Appellant has created many volumes of detailed analyses to quantify those specifications which it considers were changed because of acceptance of VECP 8680. Before we reach consideration of these materials, however, we must first determine whether each specification included in appellant's claim meets the definition of "essentially the same item" as used in the Value Engineering Incentive clause, J09 (F/F/3) under which a share of savings on both concurrent and future contracts for essentially the same items is awarded.

Appellant's Position

Appellant uses a very broad interpretation of both what approval of VECP 8680 actually includes and what constitutes "essentially the same item" as used in J09. Its position, in defining the term, is that the safety stitch operation recommended by VECP 8680 is not restricted to any garment or material; it is only confined to the edge of two pieces of fabric going together. Therefore, even though VECP 8680 was submitted on the raincoat specification to cover specific operations involving the raincoat lining, i.e., overedging the lining and then joining it to the sleeve, appellant maintains

that the focus of VECP 8680 was to combine the two separate operations of overedging and joining into a single operation using the safety stitch and that any garment utilizing such operation would qualify as essentially the same items. Appellant also argues that VECP 8680 included the combination of operations that are the functional equivalent of the overedging and joining operations described in VECP 8680 on essentially the same items. Functionally equivalent operations would be the (1) protection of raw edges using a lapped type seam and (2) sewing of multiple single needle rows using a lock stitch (F/F 24). In appellant's view, the safety stitch is not restricted to any seam and can be used on all garments and is essentially the same operation with respect to all garments without regard to the type of garment involved or, as long as compatible materials are used, to the type of material involved and does not require the use of any specific machine.

Appellant maintains that the objective of VECP 8680 was to improve productivity and save material where two or more plies of fabric are joined together and where one or more of the plies is "neatened" or protected from unravelling. The intent is achieved by (1) combining the two specific operations of overedging and joining, or (2) combining the two sewing operations (with multiple steps) that are the functional equivalent of the overedging and joining operations specified for the raincoat. While appellant recognizes that the VECP 8680 was framed in terms of the operations included in the specification applicable to its contract, it maintains that this was because it had to submit the VECP in terms of its application to the garment involved in its contract because of the format required. It asserts that the VECP was broader than that and "[i]f the articles can use the concept or its

functional equivalent and have benefitted from appellant's proposal or its functional equivalent, the articles should be considered essentially the same and a royalty sharing based upon the cost savings the Government has enjoyed is appropriate" (app. br. at 125).

The Government's Position

The Government interprets the language in the Value Engineering Incentive clause in a much narrower fashion. Its position is that the language in paragraphs (e)(2)(i) (sharing in savings on concurrent contracts) and (e)(3)(ii) (F/F 3) (sharing in savings on future contracts) which speaks of purchases of "essentially the same item" means an item which serves the same function and has the same fabrication. Therefore, in the case before us, savings are applicable only to purchases of all-weather coats which required the use of the safety stitch in attaching the sleeve lining to the sleeve of the coat. In addition, where the requirement is an alternate method of construction, savings are payable only in those instances where the alternate using the safety stitch was actually used.

Conclusion

We cannot accept the position of either party. In our view, appellant's position is too broad and the Government's position is too narrow. We agree with appellant that application of the Value Engineering Incentive clause must be liberally interpreted, since its purpose is to encourage contractors to make suggestions which will save the Government money by allowing them to share in such savings. However, the clause itself indicates that there are limits in both the period for such savings and the item

procured. Therefore, we must examine the facts for each particular situation. We cannot make a broad statement that is generically applicable.

While we recognize that the decision in M. Bianchi of California, ASBCA Nos. 37029 and 37071, supra, rejected appellant's position that any item packed in a shipping container (box) was "essentially the same item" as used in the J09 clause similar to the one in the instant appeal, and concluded that most of the items were not even remotely similar to the woman's pantsuit purchased under the contract involved in that appeal, the question is factual and must be considered based on the garment and the VECP.

We are not persuaded by appellant's argument that the term should be defined to include any application of the safety stitch to any item of clothing. The safety stitch was not a new or novel operation. It was even used in other operations in the specification which was involved in this contract (F/F 20). As a matter of fact, many of the applications for which appellant claims entitlement are more similar to the operations which were already in the specification prior to submittal of VECP 8680 and we cannot accept appellant's argument that its submittal "reminded" the Government it should consider using the stitch in other specifications and applications. The fact that the safety stitch is incorporated into manufacture of the garment indicates that the Government has already concluded that it would meet the functional and other requirements of the garment. Otherwise, it would not have designated the use of the stitch. Appellant could have expressed its submittal in broader terms and specified its application to the instant contract. It did not do so. We, therefore, conclude that recovery for savings under this VECP

would only apply to items which reflected the change appellant had suggested.

Nor are we persuaded by the Government's reliance on dicta in our opinion in Tennier Industries, Inc., ASBCA No. 29464, 86-3 BCA P19,046. That case concluded that the contractor was not entitled to any savings because the Government was already testing the subject of its proposal. The Board was not faced with the question before us and did not consider the term "essentially the same item" when it concluded that two sleeping bags were not "one and the same." In our view, "one and the same" is a different conclusion from "essentially the same." At best, the conclusions which the Government draws from that opinion are based on dicta.

We also limit our consideration to 6 April 1981 through 5 April 1984, the period during which appellant would share in savings. This would eliminate any consideration of MIL-J-87024. Appellant's claim included 104,431 jackets delivered during the royalty period. However, this was prior to issuance of the amendment to the specification on 4 May 1984 which appellant alleges resulted in incorporation of VECP 8680 (F/F 24). Examining each of the remaining eighteen operations for which appellant seeks a share of savings (F/F 24), we conclude that none can be attributed to VECP 8680. We eliminate the operations requiring the use of a lap seam (F/F 24) since that is a different type of seam than the seam recommended by appellant. We also eliminate those specifications which require the use of the stitch and seam in VECP 8680 which join other seams, such as side seams, or the setting of the sleeve into the garment or other operations unrelated to that

suggested by appellant in its VECP.

We, therefore, conclude that appellant is not entitled to recover instant or future contract savings for any of the nineteen items included in its claim as set forth in F/F 24.

Quantum

Having reached the conclusions set forth above, we must consider the per unit savings resulting from incorporation of the safety stitch operation approved as VECP 8680 and the number of units to which those savings should be applied. We have already concluded that the instant contract savings should not be reduced by the cost of adding the line or bar tack as implementation costs for the VECP (F/F 31). The record failed to establish that VECP 8680 required such inclusion.

Direct Labor Savings

Appellant introduced extensive evidence of costs before and after the changes resulting from VECP 8680. It seeks both savings in labor and in material. We have set forth the after-the-fact computations in F/F 27-37. Included in appellant's computation was a calculation of escalation of costs over the three-year savings period. The Government argues that there is no provision in the Value Engineering Incentive clause for escalation of costs. That clause, F/F 3, is silent about this question. It neither permits or prohibits increases due to escalation of costs over the payment period. It permits the savings and recognizes that this may include some estimates. See, for example, paragraph (e)(1)(i)(A).

While it may be proper to use escalation when estimating the amount of instant contract savings prospectively pursuant to paragraph (e)(1)(i)(A) of the Value Engineering Incentive clause, the instant contract savings here are calculated on appellant's actual, experienced labor rate of $ 4.00 per hour. This already reflects any labor rate escalation which may have occurred during contract performance. Since the clause provides that future contract savings are calculated using "instant contract savings," there is no provision for escalation during the royalty period beyond what may have been reflected in instant contract savings.

Contractor and Government Furnished Material Savings Appellant also seeks savings for material because of the approved VECP. While it recognizes that there were no actual material savings (F/F 31), it argues that there should have been new patterns issued and savings in material would have resulted. We have already concluded that a line tack because of the excess fabric length was not established as a result of implementing VECP 8680 (F/F 3). By the same token, we conclude that appellant's recovery is limited by the proposal which it made when submitting the VECP. It could have included a recommendation that the patterns be adjusted and that this would save fabric. It did not do so. Therefore, we do not consider it part of VECP 8680. The proposal as submitted by appellant was sketchy at best and did not contain all the documentation required by the clause (F/F 3 at (b)). The Government requested additional information which, when provided, also lacked the type of detail appellant supplied as proof for this hearing. If appellant considered that there would be a saving of fabric, it could have said so. Its submittal and additional response both addressed direct labor savings. There was no reference to direct material savings.

The only reference to material was to 2¢ savings "as a percentage to apply to direct labor and material cost." It is not clear just what appellant meant by that, but it is clear that in estimating a 10¢ savings, in addition to the above 2¢, appellant estimated 6¢ for direct labor and 2¢ for overhead (F/F 8). We conclude that there is no basis for including an amount for unrealized fabric savings on the basis that there could have been such savings had patterns been changed.

Indirect Expenses

The DCAA recommended rate for 1980 of 47.94 percent was used by appellant in calculating instant contract savings because of lack of historical data for 1981 (F/F 35). We conclude that overhead for 1981 was greater than that for 1980. The Government had used 100 percent and this amount was accepted by the contracting officer in making the determination of unit savings as a result of VECP 8680. We conclude that the 47.94 percent did not reflect the 1981 overhead and accept the amount used by the contracting officer in determining unit savings. Cf. S. W. Electronics & Manufacturing Corp. v United States, 655 F.2d 1078 (Ct. Cl. 1981).

Profit; Concurrent Contract Savings; Future Contract Savings

Appellant seeks profit of 11.9 percent. It recognizes that it is not entitled to profit on instant contract savings but argues that it is entitled to them on concurrent and future contract savings. We do not agree. Concurrent contract savings should be based on the actual negotiated savings under those contracts. Since, in the instant case, the Government negotiated those contracts with two changes, for one of which

(the line tack) we have concluded this VECP should not be charged, we conclude that instant contract savings would be a reasonable jury verdict amount to apply to concurrent contract savings. Future contract savings are also based on instant contract savings unless the Government determines that there should be an adjustment. It made none and we see no basis for doing so as to the items for which we conclude appellant should recover.

Appellant also states that the 11.9 percent is included in instant contract savings not as profit on savings but as part of its estimate of acquisition savings. We consider this a euphemism for profit and unallowable pursuant to ASPR 1-1706.1 (F/F 36). We are also not persuaded by appellant's argument that the prohibition on profit pertains only to appellant's contracts and not to contracts of third parties. Since, by the clause, concurrent contract savings are the negotiated savings to the concurrent contractor and future contract savings are, with certain exceptions, based upon the instant contract savings, we conclude that the prohibition of profit pertains to all savings permitted under the clause.

Instant Contract Savings

Considering all of the above, after eliminating those items in appellant's calculation which we have determined should not be included, we conclude that, based upon this record, the instant contract savings resulting for VECP 8680 was $ 0.14 (14¢) per unit. Contractor assigned savings, 50 percent of this amount, would be $ 0.07 (7¢) per unit. Multiplying $ 0.07 by the 837,329 units we have concluded was a reasonable number (F/F 38), we conclude appellant is entitled to the following as contract savings for instant,

concurrent and future contracts:

$ 0.07 X 837,329 = $ 58,613.03

Collateral Savings

The Value Engineering Incentive clause included in this contract, J09 (F/F 3), did not contain the provision for collateral savings resulting from acceptance of a value engineering change proposal. ASPR 1-1703.2 (1 July 1976) permits such exclusion when the head of the procuring activity determines that the cost of computing and tracking collateral savings would exceed the benefits derived from the change (F/F 44). Appellant argues that the record fails to contain the requisite documentation for this determination so collateral savings should be awarded. By the same token, appellant failed to submit the requisite prediction of any collateral savings as required by J09 paragraph (b)(iv), the Value Engineering Incentive clause in the contract (F/F 3). We conclude that the unrebutted testimony that the DPSC Manual instructing that the collateral savings clause not be included because of a determination by the agency head is sufficient for purposes of this record.

Appellant is not entitled to recover collateral savings which it seeks ($ 3,997,660.80).

Interest

Appellant seeks interest from six months after approval of VECP 8680 since J09(f) requires payment of concurrent and future savings within six months of modification of concurrent or future contracts. That

paragraph makes no provision for interest. It is well established that payment by the Government of interest is only permitted by contract, statute or regulations. Here there is no such provision. Interest is payable pursuant to the Contract Disputes Act from the date of receipt of the claim until paid. While the parties agree that that date was 16 November 1987, the facts indicate the claim was not received until 17 November 1987. Appellant is entitled to interest on any amount due from 17 November 1987 at the applicable rates.

Summary

The parties submitted well written and extensive briefs. We have considered all of the arguments which they included but, in order to not prolong an already lengthy opinion, we have not addressed them all directly. Those we have not discussed will not change the results we have reached. Because of the conclusions we have reached, we need not consider appellant's Motion to Strike Government Exhibits 28-38.

We have concluded that appellant's definition of its VECP was far broader and more extensive than the VECP 8680 which it submitted and which was approved. We have further concluded that under the record of this appeal recovery is limited to the all-weather coats which incorporated VECP 8680.

Since this appeal concerns determination of quantum, we have discussed the various elements which appellant included in calculating its claim and have concluded that the per unit savings were $ 0.14 per unit of which appellant is entitled to receive $ 0.07. Applying this to the number of

units, we have concluded that appellant's share of savings is $ 58,613.03. Interest on amounts due appellant should be computed from 17 November 1987.

The appeal is sustained in the amount of $ 58,613.03 plus interest on amounts due appellant from 17 November 1987 and denied as to the rest.

Dated: 10 February 1993

/s/_____
RUTH C. BURG
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

I concur

/s/_____
V. JOHN RIISMANDEL
Administrative Judge
Acting Chairman,
Armed Services
Board of Contract Appeals

I concur

_____
WILLIAM J. RUBERRY
Administrative Judge
Vice Chairman,
Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 36518, Appeal of M. Bianchi of California, rendered in conformance with the Board's Charter.

Dated: February 11, 1993

/s/_____
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[Filed September 30, 1994]

No. 93-5059,-5060

BANK OF AMERICA NATIONAL TRUST and SAVINGS ASSOCIATION, Plaintiff/Cross-Appellant	)
v.	)
THE UNITED STATES, Defendant/Third Party Plaintiff-Appellee,	)
v.	)
MAURICE L. BIANCHI, Third Party Defendant-Appellant.	)

Before RICH, MAYER, AND LOURIE, Circuit Judges.

ORDER

Under the Equal Access to Justice Act, 28 U.S.C. §

2412 (d) (1988) (EAJA), Maurice L. Bianchi requests an award of attorney fees and expenses incurred in defending against the government's third party claim. The government has moved to dismiss the application as untimely, asserting that there is not yet a final judgment in Bianchi's favor.

On April 29, 1994, this court vacated the judgment of the Court of Federal Claims, No. 90-3961C, in favor of the government against Bianchi. Bank of America Nat. Trust & Sav. Ass'n v. United States, 23 F.3d 380, 385 (Fed. Cir. 1994). Based on a settlement agreement by which Bianchi agreed to settle his contract claims against the government in return for a payment of $1,141,220.83, this court held "that the government, having waived its right to challenge the settlement, [was] precluded from seeking to recover the settlement award through a third-party complaint filed in the Court of Federal Claims." Id. At 384. The government correctly argues that only its third party claim, and not its contingent claim, was before us on appeal; it is clear from our decision, however, that the contingent claim must fail as well since it is based on identical grounds. Indeed, all that remains of the government's claims against Bianchi is the purely ministerial act of entering judgment against the government in the Court of Federal Claims. See Gavette v. Office of Personnel Management, 808 F.2d 1456, 1459 (Fed. Cir 1986) (in banc); Skip Kirchdorfer, Inc., v. United States, 803 F.2d 711, 712 (Fed. Cir. 1986).

The government's time for filing a petition for a writ of certiorari has now passed; the judgment is therefore final for EAJA purposes and the government's motion to dismiss is denied. See Melkonyan v. Sullivan 501 U.S. 89, 96 (1991) ("The 30-day EAJA clock begins to run after the time to

appeal that 'final judgment' has expired."); Skip Kirchdorfer, Inc., 803 F.2d at 712. We now consider the merits of Bianchi's application for attorney fees.

Under the EAJA, as a prevailing party Bianchi is entitled to an award of attorney fees and expenses "unless the Court finds that the position of the United States was substantially justified . . . . " 28 U.S.C. § 2412 (d) (1) (A). This court will deny an award under this section if the government "was clearly reasonable in asserting its position . . . in view of the law and the facts." Gavette, 808 F.2d at 1467 (emphasis in original); see also Pierce v. Underwood, 487 U.S. 552, 565 (1988). In this case, the government was not unreasonable in its position that it had an absolute right to recover money erroneously paid to Bianchi, and the Court of Federal Claims agreed. Although we ruled against the government, we cannot conclude that its position did not satisfy the statutory standard.

Accordingly, it is ORDERED that Bianchi's application for attorney fees and expenses is DENIED.

Date: September 30, 1994

FOR THE COURT

/s/_____
Francis X. Gindhart
Clerk